90-1520

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AQUA-CHEM, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Does an employer violate Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), when it recalls permanent replacement workers from layoff pursuant to a collective bargaining agreement rather than reinstate former strikers with greater seniority?

LIST OF PARTIES

In addition to the parties listed in the caption, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, appeared in the proceedings before the National Labor Relations Board.

LISTING PURSUANT TO RULE 29.1

Aqua-Chem, Inc. is wholly owned by Lyonnaise des Eaux.

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IN THE

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OCTOBER TERM, 1990

No.

AQUA-CHEM, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Aqua-Chem, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order and dissenting opinion denying rehearing and rehearing en banc is reported at 922 F.2d 403 and is reprinted in Appendix A beginning at (A.1). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 910 F.2d 1487 and is reprinted in Appendix B beginning at (A.5). The decision and order of the National Labor Relations Board is reported at 288 N.L.R.B. No. 121 and is reprinted in Appendix C beginning at (A.14).

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered on August 23, 1990. The order denying the petition for rehearing and rehearing en banc was entered on January 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3) provides:

It shall be an unfair labor practice for an employer ——

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT OF THE CASE

Petitioner, Aqua-Chem, Inc. (Aqua-Chem), a Milwaukee, Wisconsin based manufacturer, operates a plant in Greenville, Mississippi. The facts as found by the National Labor Relations Board's Administrative Law Judge, which are undisputed by the parties, follow. (A.31-A.44) Employees at the Mississippi plant went on strike for three and one-half months during 1980. During the strike, Aqua-Chem hired permanent replacement workers and a number of strikers returned to work. After the strike was settled, the Company reinstated former strikers as vacancies in the work force occurred.

A succeeding three year contract to the strike settlement agreement was negotiated in late 1981. In March, 1982, fifteen employees were laid off. Fourteen were permanent replacements hired during the strike. Between May and August, 1982, the Company recalled three of the laid off permanent replacements. At the time of the layoff, twenty-eight

unreinstated former strikers possessed greater seniority than the three replacement workers who were eventually recalled. None of the unreinstated strikers were considered at the time of the recalls and some were qualified to fill the positions in question.

The collective bargaining agreement in force at the time of the layoffs and recalls provided that laid off workers would be recalled "in reverse order of layoff." The agreement also defined the length of time during which laid off workers would enjoy recall rights.

In 1983, an Administrative Law Judge (ALJ) issued a decision finding that the Company's decision to recall replacements rather than reinstate the more senior former strikers violated Section 8(a)(3) of the National Labor Relations Act. (A.53). He found that the layoff of the replacements constituted a "departure" within the meaning of *Laidlaw Corporation*, 171 NLRB 1366 (1968), *enforced*, *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) thereby triggering the reinstatement rights of the former strikers to any subsequent "vacancies." (A.50).

The Company appealed and five years later, the National Labor Relations Board (NLRB) issued its decision affirming the ALJ's conclusion that a violation of the Act occurred. In so finding, however, the NLRB rejected the ALJ's conclusion that a prolonged indefinite, economic layoff of replacements creates vacancies per se triggering Laidlaw rights (A.18). Rather, the NLRB utilized the case to announce a new form of analysis under which the dispositive issue is whether, at the time of the layoff, the replacements had a "reasonable expectation" of recall (A.20).

In applying this analysis to the case before it, the NLRB concluded that no such "reasonable expectation" existed for the replacements in question. The NLRB relied on the fact that employees were advised that the layoff was due to lack

of work and was for an indefinite period, that their insurance would be cancelled, and that they should look for another job or apply for unemployment compensation (A.21-A.22). Although this concedingly negative business outlook has been consistently acknowledged by the Petitioner, it is equally undisputed that no termination of employment occurred. To the contrary, the fourteen replacements and one returned striker were placed on layoff status and were told that the Company would "make every effort to return them to work as soon as possible" (A.22). The NLRB concluded that this representation was insufficient to undermine the other evidence as it applied the newly announced "reasonable expectation" test.

On appeal to the Seventh Circuit, Petitioner argued that the NLRB had ignored the effect of the contractually enforceable provisions which conferred upon all covered employees a reasonable expectation of recall during their respective periods of seniority retention. Further, Petitioner relied upon the Seventh Circuit's earlier decision in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), where the Court had concluded that an employer could extend recall rights to permanent replacements for a defined period of time. In that decision, the court concluded that such an extension of recall rights merely confirmed the permanent status of replacements under this Court's holding in *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

The panel rejected Petitioner's argument and affirmed the decision of the NLRB (A.5). In a footnote, the panel attempted to distinguish *Giddings*, 675 F.2d 926, on the basis that no actual layoffs occurred in that case, even though the *Giddings* court did hold that an employer could lawfully recall less senior replacements ahead of unreinstated strikers. (A.10, N.4). In rejecting Petitioner's argument with respect to the effect of the contractual recall rights, the panel stated: "We agree with the Board's finding that the circumstances presented to the laid-off replacement workers could

reasonably have extinguished any expectancy of recall harbored by these workers on account of the contract." (A.10).

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc. In a six to five vote, with a strongly worded dissent, the court denied the Petition (A.1). In his dissent, Judge Posner concluded that under the holding of this case, a replacement is deprived of the permanent status lawfully conferred upon him by the recall provisions of the contract and concluded: "The role of the replacement worker is fundamental in contemporary labor relations. The panel's decision muddies that role, unsettles the law, buries the rights of management and labor alike in uncertainty and confusion." (A.4).

Subsequent to the denial of the Petition for Rehearing, Petitioner has filed this timely Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN *NLRB V. MACKAY RADIO & TELEGRAPH CO.*, 304 U.S. 333 (1938).

Economic pressure is basic to this nation's labor policy. In 1938, three years after the passage of this country's primary labor law, the National Labor Relations Act (NLRA), the right of an employer to hire permanent replacements for striking workers, was confirmed by this Court. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). The continuing vitality of that rule has been reaffirmed by this Court through the years and as recently as the last term. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants (TWA II)*, 489 U.S. 426 (1989). Labor unions bring pressure to bear through the threat of strike and the exer-

cise of the right to strike. Employers, in some circumstances, may counter the strike threat and its consequences with the decision to hire permanent replacement workers. When the employer hires permanent replacements, the striking employees "gamble" on the success of the strike and "suffer the consequences" if the gamble proves unsuccessful. *TWA II*, 489 U.S. at 438. At the conclusion of the strike, the returning strikers enjoy the right to re-employment only insofar as "there [are] vacant places to be filled." *MacKay*, 304 U.S. at 346. The decisions of the National Labor Relations Board and the Seventh Circuit in this case have upset the delicate balance of rights that exist between permanent replacements and returning strikers - rights forged by this Court from *MacKay* through *TWA II*.

At the heart of the dispute is the definition of the term "vacancy" in the aftermath of a strike. In March, 1982, a year and one-half after the strike ended, Aqua-Chem's work force consisted of eighty-eight employees, thirty-three of whom were permanent strike replacements. Fourteen of those replacement workers were placed on layoff status. While the economic picture was definitely bleak and the layoff was considered "indefinite," the employees enjoyed contractual recall rights for a defined period of time. Within that time-frame they were recalled ahead of unreinstated strikers with greater seniority.

When the matter reached the National Labor Relations Board, the Board utilized this case to announce a new standard designed to resolve the "competing interests." The Board held that the question of whether the replacements had a "reasonable expectation of recall" at the time of the layoff would determine whether they could be recalled ahead of strikers. The Board then concluded that no such "reasonable expectation" existed in this case.

The Board's decision is at odds with the Seventh Circuit's holding in *Giddings & Lewis v. NLRB*, 675 F.2d 926 (7th Cir.

1982). In *Giddings*, the court upheld the validity of unilaterally promulgated seniority rules which provided that laid off replacements would be recalled from layoff for a defined period of seniority retention ahead of more senior unreinstated strikers. The *Giddings* court rejected the NLRB's underlying analysis and differentiated "job vacancies" from openings created by layoffs stating, "A layoff, by definition, is not a termination of the employment relationship." *Id.* at 931. Notwithstanding its prior holding in *Giddings*, the Seventh Circuit in this case adopted the Board's "reasonable expectation of recall" standard.

The problem with the Board's analysis is that it ignores that, as replacements under *MacKay*, the employees were entitled to permanent status, a status which included the full layoff/recall protection afforded *all* employees by the contract. It is illogical to hold that an employee has no reasonable expectation of being able to exercise a contractually guaranteed right shared with all other employees covered by the contract.

At the time of the layoff, each replacement was contractually assured that they would be recalled in reverse order of layoff provided the recall opportunity occurred during their defined period of seniority retention. Recall opportunities did, in fact, arise during this period and yet the NLRB, as affirmed by the Seventh Circuit, has held the extension of this contractual right to be unlawful. To reach this result the Board concluded that the replacements had "no reasonable expectation" that what in fact happened, would happen.

Why did the Board and the court adopt such strained and illogical reasoning? The answer was made abundantly clear by the Seventh Circuit:

> Aqua-Chem claims that the laid-off replacement workers actually had a "reasonable expectancy of recall" because they were guaranteed the right to be recalled in reverse order of layoff by the new collective bargaining agreement. We think, however, that Aqua-Chem's

> position begs the question -- given the policies at issue. The replacement workers were exposed to *layoff* only because they had secured jobs by *replacing* the striking workers. (A.9) (Emphasis original).

Thus, it is because the workers in question are "scabs" that they are subject to a form of analysis through which the "reasonable expectation" test can be used as a sword to sever their contractual rights of recall. This Court has rejected the notion that because an employee is a replacement, his status does not entitle him to the full rights and privileges inherent in the employment relationship: "We do not think the normal contractual rights . . . of the replacements can be so easily disposed of by broad-brush assertions that no legal rights may accrue to them during a strike because the federal law has privileged the "permanent" hiring of replacements. . . ." *Belknap, Inc. v. Hale,* 463 U.S. 491, 501 (1983).

A form of anlysis that relegates the replacements to second class status under the contract and under the law is in conflict with this Court's decision in *MacKay. MacKay* extended to employers the right to not only hire replacements in the event of a strike, but to provide assurances that those jobs were permanent once the strike was settled. There is simply no basis upon which the right to extend permanent status to replacements given employers by *MacKay* can be reconciled with the NLRB's decision in this case. As noted by Judge Posner in his dissent: "A permanent replacement is in fact temporary if in the next economic downturn his recall rights will be pushed below that of every former striker." (A.3).

The "gamble" that strikers take on the consequences of a strike, which this Court recognized in *TWA II,* is significantly reduced by the Seventh Circuit's decision in this case. It is the permanent replacements who must now "gamble" that they will not lose their positions in the event of an economic slowdown. Moreover, the court's decision has eviscerated the

MacKay rule granting employers the privilege of extending permanent status to the replacements. As stated by this Court in *Belknap:* "But when an employer attempts to exercise this very privilege by promising the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law. . . ." 463 U.S. at 500.

A Writ of Certiorari should issue because the National Labor Relations Board, as affirmed by the Seventh Circuit, has rendered a decision in conflict with an applicable decision of this Court.

II.

THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD, AS AFFIRMED BY THE SEVENTH CIRCUIT, IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Eighth and Sixth Circuits, as noted by Judge Posner in his dissent, have issued decisions fully extending the rights of permanent status conferred by this Court in *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938) in a manner inconsistent with the decision of the Seventh Circuit in this case.

In *Medallion Kitchens, Inc. v. NLRB*, 806 F.2d 185 (8th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987), the Eighth Circuit affirmed a NLRB decision finding that the employer violated the Act when it returned replacements rather than former strikers following a fire which had shut down its operation. The case turned, however, on the question of whether the replacements were in fact permanent or whether they had been employed only for the duration of the strike. It was clear that had the Court found the replacements to be permanent, their return in lieu of the return of the more

senior, former strikers, would have been lawful. The Court held that the return of replacements who "were given permanent status" was a viable, lawful justification for the failure to reinstate the former strikers. *Id.* at 189 (citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) and *MacKay*, 304 U.S. at 345-46).

In *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), the employer operated a ready mix concrete business and its unionized drivers were assigned delivery runs based on seniority. Drivers at the top of the list had virtually unlimited work, drivers in the middle of the list had essentially part-time jobs, and drivers at the bottom third received only limited work.

During a strike, the employer's workforce was comprised of employees who crossed the picket line and were placed at the top of the list in order of seniority and replacement workers, some with prior experience and some new to the industry. When two strikers unconditionally offered to return to work, they were reinstated on the seniority list above the replacements with no prior experience, but below replacements with prior experience. If they had been credited with full seniority, they would have been at the top of the list and would have benefited through access to unlimited work.

The NLRB held that the failure to credit them with full seniority violated the Act. The Sixth Circuit reversed, holding that the case turned on whether the employer's actions constituted an extension of unlawful super-seniority to the replacements under *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) or a mere extention to the replacements of the permanent status to which they were entitled under *MacKay*, 304 U.S. 333. *Id.* at 80. Thus, the issue considered was the same as that involved in this case. Significantly, the Court held that *MacKay* was controlling and that the employer could lawfully maintain the replacements in the preferred

positions: "In short, Harrison had a legitimate business purpose, as in *MacKay*, for protecting the replacement employees' place on the work list. . . ." *Id.* at 81.

The Seventh Circuit's underlying decision in this case is in conflict with the Eighth Circuit's recognition of an employer's right to recall permanent replacements from layoff ahead of more senior unreinstated strikers and the Sixth Circuit's recognition of an employer's rights under *MacKay* to extend the full benefit of the permanent status to which the replacements are entitled.

III.

IF THE COURT BELIEVES THAT ITS DECISIONS HAVE NOT RESOLVED THE QUESTION PRESENTED, A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE QUESTION PRESENTED IS AN IMPORTANT ONE.

If the Court concludes that *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), does not dispositively address the question of whether an employer may lawfully extend to replacements the full benefit of the contractual protection afforded other employees, the Court should grant certiorari to resolve this extremely important question.

As noted by Judge Posner in his dissent, the effect of the decisions of the NLRB and the Seventh Circuit is that both the employer and the replacements are "at sea" with respect to what offers of permanency can be made and what offers of permanency are valid (A.4). The "reasonable expectation" test is inherently speculative and at odds with the realities dictated by an uncertain economy in general and the fluctuations experienced by particular industries.

It is an unfortunate fact of industrial life that layoffs are a necessary response to business realities. Pursuant to the

analysis dictated by the underlying decisions, when business volume mandates additional manpower following a layoff, the employer is forced to discern the "reasonable expectations" of the replacements at the time of the layoff. No matter which way it opts, the employer faces significant risk. If it defers to the replacements and extends to them their contractual recall rights, it faces a challenge before the NLRB by the former strikers. If it defers to the strikers and offers reinstatement, it faces a challenge from the replacements in the form of a claim for breach of the contractual mandates or a civil action for breach of the promises of permanency made by the Company, as was considered by this Court in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983).

An approach which places the parties in a sea of uncertainty is not a rational resolution of the competing interests involved, especially given the straight-forward, logical alternative, as was set forth by the Seventh Circuit in *Giddings.* The simplicity and reasonableness of that decision are compelling:

(1) A layoff by definition is not a termination of the employment relationship.

(2) Where an employer extends recall rights for a defined period, it is merely confirming that the relationship is permanent when business is bad as well as good, as authorized by *MacKay.*

(3) So long as the replacement retains employment, albeit on layoff status, there is no vacancy as would trigger the reinstatement rights of a former striker.

The rights and obligations of an employer with respect to replacements in the context of layoff and recall raises a significant issue. To reject an approach that logically resolves the question in favor of the analysis designed by the Board is wrong. To hold that an employer may not lawfully extend

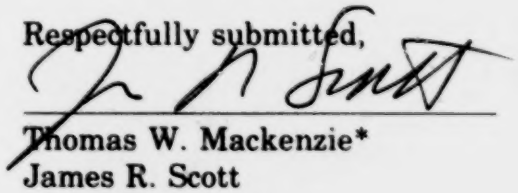
to replacements the contractual protection afforded other employees deprives those workers of the permanent status to which they are entitled under federal law. The issue raised is significant and warrants consideration by this Court.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Seventh Circuit below.

Dated at Milwaukee, Wisconsin this 2nd day of April, 1991.

Respectfully submitted,



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APPENDIX A – ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC FROM THE SEVENTH CIRCUIT DATED JANUARY 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-2191 & 88-2475

AQUA-CHEM, INC., CLEAVER-BROOKS DIVISION,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

On Petition for Rehearing and Rehearing En Banc

REHEARING AND SUGGESTION FOR
REHEARING EN BANC DENIED – JANUARY 8, 1991

Before BAUER, *Chief Judge, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, Circuit Judges.*

On September 4, 1990, the petitioner filed a petition for rehearing with suggestion for rehearing en banc. An answer to the petition was requested and response was filed by the National Labor Relations Board on September 27, 1990. All

of the judges on the original panel voted to deny a rehearing. A judge in regular active service requested a vote and the majority of the judges voted to deny a rehearing en banc. POSNER, COFFEY, FLAUM, EASTERBROOK and MANION, *Circuit Judges,* voted to grant rehearing. Accordingly, the petition for rehearing is hereby DENIED.

POSNER, *Circuit Judge,* with whom COFFEY, EASTERBROOK, and MANION, *Circuit Judges,* join, dissenting from the denial of rehearing en banc. When workers go out on a strike not provoked by any unfair labor practices, the company is entitled to hire permanent replacements for the striking workers. *NLRB v. McKay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). Although the company cannot offer these replacement workers unlimited seniority as an inducement to accept employment, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), it can promise them that if they are subsequently laid off the layoff will not create vacancies that the employer either can or must fill by recalling the strikers whom the replacement workers had replaced and who by definition will have greater seniority, having been hired earlier. Such a promise, we held in *Giddings & Lewis, Inc. v. NLRB,* 675 F.2d 926, 930-31 (7th Cir. 1982), does not violate the National Labor Relations Act. The Eighth Circuit agrees, *Medallion Kitchens, Inc. v. NLRB,* 806 F.2d 185, 188 (8th Cir. 1986); *Randall v. NLRB,* 687 F.2d 1240, 1247 (8th Cir. 1982) (dictum), and probably the Sixth as well, cf. *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78, 80 (6th Cir. 1985); no circuit has registered disagreement. The employer in this case made such a promise. It promised that when a layoff ended, the company would recall workers not in order of seniority but in reverse order in which they had been laid off, thus putting the replacement workers ahead of some former strikers having greater seniority.

Giddings had reversed the Labor Board. The Board did not react with gracious acquiescence. When this case came along, the Board held, contrary to *Giddings,* that the layoff

of the replacement workers had created vacancies which the company was obliged to fill with strikers whom the replacement workers had replaced. The Board reasoned that the replacement workers who were laid off had no reasonable expectation of being recalled, though of course they *were* recalled—it was because they were recalled ahead of strikers having greater seniority that the company was found to have engaged in an unfair labor practice. Because the replacement workers lacked such an expectation, the Board concluded, their interest in their jobs was less than that of the strikers. The panel accepted the Board's reasoning and distinguished *Giddings*. 910 F.2d 1487 (7th Cir. 1990).

Giddings allows an employer to offer replacement workers a contract that will put them ahead of the strikers they have replaced in the event that there is a layoff. Such a contract was made here. The Board and the panel have forced the employer to break it. For there is no ambiguity about what the contract provides. The panel acknowledges that the permanent replacements had "a contractual right to recall" in the event of a layoff. *Id.* at 1490. They were laid off, and pursuant to the contract they were recalled in reverse order of layoff. The Board and the panel hold that in honoring its contract with the replacement workers the employer violated the National Labor Relations Act. Yet it was a lawful contract; *Giddings* so held, and the panel does not question *Giddings'* soundness.

This case and *Giddings* cannot stand; and *Giddings* is the sounder decision, as well as one with support in other circuits. A permanent replacement is in fact temporary if in the next economic downturn his recall rights will be pushed below that of every former striker. The replacement worker is a second-rate citizen in another sense, under the approach of the Board and the panel; the employer is not required—indeed, is forced to flout—the rights that the collective bargaining agreement confers on the replacement. The employer is forced to do this even though they are lawful

rights. The panel does not question the propriety of conferring on permanent replacements the contractual right to recall in the event of layoff. But what it gives with one hand it takes away with the other by holding that the Board can balance the interests of the replacement workers and of the strikers and if the balance inclines in favor of the latter can deem the contractual right an unfair labor practice.

Even if the result were correct, the method of reaching it would be awful. It depends on a balancing test the outcome of which cannot be known in advance and which therefore leaves at sea both the employer, who cannot know what offers it can make to permanent replacements, and the replacement worker themselves, who cannot know what offers made to them are valid.

The role of the replacement worker is fundamental in contemporary labor relations. The panel's decision muddies that role, unsettles the law, buries the rights of management and labor alike in uncertainty and confusion. We should rehear the case en banc.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B – JUDGMENT FROM THE SEVENTH CIRCUIT DATED AUGUST 23, 1990

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-2191 & 88-2475

AQUA-CHEM, INC., CLEAVER-BROOKS DIVISION,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner

Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

ARGUED DECEMBER 12, 1989–
DECIDED AUGUST 23, 1990

Before WOOD, JR., CUDAHY and KANNE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The National Labor Relations Board found the petitioner, Aqua-Chem, Inc., guilty of violating sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. 29 U.S.C. §§ 158(a)(1), (3). Aqua-Chem has petitioned for review. The Board has cross-petitioned for the enforcement of its order. We grant the Board's petition for enforcement.

I. FACTUAL BACKGROUND

This case began when Aqua-Chem, Inc. and its employees' union could not agree on the terms of a new collective bargaining agreement. The employees eventually struck the company and Aqua-Chem was forced to hire replacement workers. This economic strike ended after five months, with the employees offering unconditionally to return to work. At the end of the strike, Aqua-Chem's workforce consisted of 25 former strikers and 69 replacement workers.

The strike settlement agreement negotiated by the parties included a provision dealing with the recall of striking employees. Under this new agreement, striking employees were to be returned to work as vacancies occurred, subject to worker qualifications. The new collective bargaining agreement, on the other hand, provided for recall from layoff "in reverse order of layoff." When business slowed, Aqua-Chem laid off 14 replacement workers and 1 former striker. These workers were told that their layoff was indefinite, that their life insurance would be cancelled immediately, that their medical insurance would be terminated at the end of the month and that they should look for other jobs or apply for unemployment compensation.

Subsequently, the company laid off another former striker, recalled 4 workers from layoff (3 of whom had been replacement workers) and laid off another former striker. Aqua-Chem did not consider any of the 28 strikers who had yet to be reinstated to fill the positions offered to the 3 laid-off replacement workers. Each of the unreinstated strikers had more seniority than the replacement workers who had been recalled. Some of the unreinstated strikers were qualified to fill the positions given to the recalled striker replacements.[1] In addition, at about this same time (and long

[1] We note that the layoff figures offered by the two parties do not correspond exactly. We do not, however, think that any of these differences are material.

after the strike had ended) Aqua-Chem sent a letter to the unreinstated strikers which stated that the reinstatement rights of these strikers would be terminated if they failed to notify the company within 5 days of their continuing interest in being recalled.

The National Labor Relations Board issued a complaint with respect to these practices, alleging that the company had violated §§ 8(a)(1) and (3) of the National Labor Relations Act. The case was tried before an ALJ who found against Aqua-Chem. The NLRB basically affirmed the ALJ's findings. Aqua-Chem has petitioned this court for review of the Board's decision. The NLRB, on the other hand, has cross-petitioned for the enforcement of its order requiring Aqua-Chem to cease and desist from engaging in the unfair labor practices we have described and requiring Aqua-Chem to offer reinstatement, with backpay, to those unreinstated strikers for whom positions were available. We grant the Board's cross-petition for the enforcement if its order.

II. LEGAL ANALYSIS

A. Failure to Recall Strikers with More Seniority

The issue presented by this case is one of first impression, though the policies underlying the issue are fundamental to labor law. Section 8(a)(3) of the National Labor Relations Act protects striking workers' jobs from discrimination so that their rights to union organization and other collective activity will not be chilled.[2] This means that economic strikers are entitled to full reinstatement to their former positions at the conclusion of a strike. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). On the other hand, labor law

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[2] Specifically, section 8(a)(3) provides, in relevant part, that "[i]t shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

purports to recognize business reality and allows a company that has been struck by its workforce to hire permanent replacements as business needs dictate. *NLRB v. Mackay Radio & Telegraph Co., Inc.*, 304 U.S. 333, 345-346 (1938). A balance between the rights of organized workers and business has been struck by allowing replacement workers to be kept on permanently (in order to give the replacement workers adequate incentive to take replacement jobs), but by requiring *genuine vacancies* in the workforce to be given, in line of seniority, to the striking workers after the strike is over. *Laidlaw Corporation*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969).

Because economic strikers who have been permanently replaced but who have unconditionally offered to return to work are entitled to reinstatement upon the departure of their replacements, this case centers upon the concepts of "vacancy" and "departure" employed in *Laidlaw:* How should the layoff of a permanent replacement worker—who has a contractual right to recall—affect the reinstatement rights of unreinstated strikers? When is a layoff considered permanent so as to trigger the striking workers' rights to reinstatement? These questions are presented by this case. Their answers require balancing the competing labor policies that we have discussed.

In this case, the NLRB adopted a burden-shifting analysis which attempted to accommodate the policy of protecting striking workers' rights to organize with a company's need to hire and protect the jobs of replacement workers. This analysis requires that the General Counsel first make a showing that any layoffs "truly signified the departure of the replacements": that the laid-off replacement workers had no "reasonable expectancy of recall."[3] Once a prima facie show-

[3] For a list of objective factors considered relevant to the replacements' "reasonable expectancy of recall" see the May 26, 1988 Decision and Order of the NLRB, Petitioner's Appendix at 107.

ing that the laid-off replacements had no "reasonable expectancy of recall" has been made, the burden shifts to the employer to rebut the showing of a vacancy or to show legitimate and substantial justifications for failing to recall the striking workers.

The narrowness of our review of NLRB decisions is well-established. We "must uphold the legal conclusions of the Board 'unless they are irrational or inconsistent with the [National Labor Relations Act].' " *David R. Webb. Co., Inc. v. NLRB,* 888 F.2d 501, 503 (7th Cir. 1989), *quoting NLRB v. Parents and Friends of the Specialized Living Center,* 879 F.2d 1442, 1448 (7th Cir. 1989) (citing *NLRB v. Financial Institution Employees,* 475 U.S. 192, 202 (1986)); *see also NLRB v. Manitowoc Engineering Co.*, No. 89-2623, slip op. at 14-15, n.10 (7th Cir. Aug. 2, 1990). We will, however, review the record of a case as a whole. *See NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1283-1284 (7th Cir. 1989). After reviewing the record in the case before us, we conclude that the fact-specific burden-shifting analysis adopted by the Board is both rational and consistent with the policies behind the NLRA because it comports with the *actual* expectations of all concerned: the unreinstated strikers, the replacement workers and the company. On that basis, we shall assess whether the Board's factual findings are supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

Aqua-Chem claims that the laid-off replacement workers actually had a "reasonable expectancy of recall" because they were guaranteed the right to be recalled in reverse order of layoff by the new collective bargaining agreement. We think, however, that Aqua-Chem's position begs the question—given the policies at issue. The replacement workers were exposed to *layoff* only because they had secured jobs by *replacing* the striking workers. Thus, the real question to be answered here is where do we strike a fair balance between the com-

peting policies.[4]

It is undisputed that the laid-off replacement workers were told: that their layoff was indefinite, that their life insurance would be cancelled immediately, that their medical insurance would be terminated at the end of the month and that they should look for other jobs or apply for unemployment compensation. Petitioner's Brief at 15. The Board concluded that because the laid-off replacement workers had no reasonable expectation of recall, their lay-offs and the resulting vacancies triggered the strikers' reinstatement rights.[5] In short, the Board thought that a departure of this kind—though called a "layoff"—constituted a departure sufficient to bring *Laidlaw* into play. We agree with the Board's finding that the circumstances presented to the laid-off replacement workers could reasonably have extinguished any expectancy of recall harbored by these workers on account of the contract. Since Aqua-Chem did not proffer any relevant business justification below—and has not pursued one on review—Aqua-Chem has not adequately rebutted the conclusion that, under the circumstances, the laid-off employees had no "reasonable expectancy of recall." We therefore find the Board's factual conclusions on this issue to be supported by substantial, and unrebutted, evidence.

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[4] Aqua-Chem asserts, in contrast, that the issue presented by this case was settled in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), in which this court held that the NLRA was not violated by company rules allowing members of the existing workforce, in the event of a layoff, to be rehired in order of seniority, but ahead of the unreinstated strikers. We disagree. There had been no actual layoffs in *Giddings*. This crucial fact, as well as the limited nature of our present review, leads us to the conclusion that the laid-off employees here were disabused, by the circumstances of their layoff, of a reasonable expectation of exercising their contractual right in a way sufficient to support the Board's analysis and conclusion in this case.

[5] We also agree with the Board's finding that the letter mailed to those on layoff, which indicated that Aqua-Chem would make every effort to return the laid-off employees to work, was sufficiently vague so as not to override the laid-off employees' expectancy that they probably would not return to work at Aqua-Chem.

B. The Threat to Terminate the Strikers' Reinstatement Rights

On August 18, 1982 (more than 2½ years after the strike began), Aqua-Chem sent a letter to all reinstated strikers, advising them that their reinstatement rights would be terminated if the company did not hear from them in writing within 5 days. Laid-off replacement employees (some of whom who had been out of work for almost 4 months) were not sent this letter. Instead, the laid-off replacement workers were sent a letter only at the time of their lay-offs asking them to "make sure" that their current addresses were on file so that their final paychecks and recall notices would be sent to the correct addresses.

At the time Aqua-Chem sent its "short-fuse" letter to the unreinstated strikers, there were no vacancies for unreinstated strikers. In addition, several replacement employees were already on layoff from positions the company treated as unavailable to the unreinstated strikers. The Board found that this letter violated § 8(a)(1) of the National Labor Relations Act, which makes it "an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of [their] rights [to organize]."

It has long been accepted that "certain employer conduct is inherently so prejudicial to employees' rights that an unfair labor practice is presumed unless the employer can prove legitimate and substantial business justifications to vindicate its actions." *Giddings & Lewis, Inc. v. NLRB*, 710 F.2d 1280, 1285 (7th Cir. 1983). This "business justification" standard is used to assess employer actions like the letter sent by Aqua-Chem because a striking employee's right to reinstatement is also tested by this standard. Accordingly, this court has reasoned that "if an employee's statutory right to reinstatement is protected by the business justification standard, then a procedure which can destroy that right without affirmative action by the employee should be subjected to the same

scrutiny." *Id.* "Administrative convenience" has been held not to constitute sufficient business justification. *Id.* at 1286.

The National Labor Relations Board ruled that the sending of this letter violated § 8(a)(1) because "the threat of termination was contained only in the letters to unreinstated strikers and not in similar letters it sent to laid-off striker replacements." May 26, 1988 Decision and Order of the NLRB at n.2, Petitioner's Appendix at 102. As noted earlier, we review the factual conclusions of the Board only to assess whether they are supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). Under the specific circumstances of this case, we find that the "threat of termination" letter sent by Aqua-Chem was not supported by the requisite "business justification."

Although the justification proffered by Aqua-Chem—namely, the need to ascertain the whereabouts of unreinstated strikers who had been out or work for over 2½ years so that their addresses would be known when they were needed for work—may have been "sufficient" in the sense that it was rational, we do not accept this justification as being "legitimate." The unreinstated strikers were threatened with the loss of their reinstatement rights if they did not respond quickly. The laid-off replacement workers (who had been out of work for as long as 4 months), on the other hand, were only sent home with a gently worded letter. They were not, unlike the unreinstated strikers, sent a separate letter as time passed. This leads us to disbelieve that work concerns actually motivated Aqua-Chem to send the letter worded the way it was to the unreinstated strikers. We can see no legitimate business reason why the same letter was not sent to all workers waiting to return to work. (It is important to remember that, at the time it acted, Aqua-Chem was planning on rehiring those already on layoff first. It would thus have seemed more logical for Aqua-Chem, according to its own reasoning, to have attempted to ascertain their whereabouts first.)

Our conclusion is further reinforced by the fact that, at the time the letters were sent out, there were no vacancies at Aqua-Chem. There was, in short, no urgent need for the unreinstated strikers to respond so quickly. Accordingly, we again find that the Board's decision on this point was supported by substantial evidence.[6]

III. CONCLUSION

Long after the conclusion of an economic strike against it, Aqua-Chem declined to consider unreinstated strikers to fill essentially vacant positions. This was a violation of the strikers' reinstatement rights under section 8(a)(3) of the National Labor Relations Act. Some time later, Aqua-Chem sent a "short-fuse" letter threatening termination to the remaining unreinstated strikers if they did not forward certain information within 5 days. This was a violation of section 8(a)(1) of the NLRA. Because we agree with the Board that these two acts unfairly chilled the strikers' rights to organize and to strike, Aqua-Chem's petition for review is denied and the Board's cross-petition for the enforcement of its order is granted.

ENFORCEMENT GRANTED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[6] Aqua-Chem contends that the Board's lack of explanation with respect to this count renders its decision erroneous. We disagree. In footnote 2 of its Decision and Order, the Board summarily concluded that section 8(a)(3) was violated because the "short-fuse" threat of termination letter was not sent to the laid-off replacement workers in addition to the unreinstated strikers. The disparate treatment reasoning behind this conclusion is obvious, and we affirm it.

APPENDIX C – DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED MAY 26, 1988

Aqua-Chem, Inc., Cleaver Brooks Division *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO.
Case 26–CA-9795

May 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 10, 1983, Administrative Law Judge Phillip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm

the judge's rulings, findings,[1] and conclusions[2] as modified herein.

The judge concluded that the Respondent had violated Section 8(a)(3) by maintaining and enforcing a policy which discriminated against certain unreinstated strikers in the filling of postlayoff vacancies. For the reasons set out below, we agree that the Respondent violated the Act in recalling laid-off striker replacements over more senior unreinstated strikers in May-August 1982.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to the judge's statements in sec. III,B of his decision, the Respondent's manufacturing manager, Neil Bone, did not characterize employee Rosemary Taylor as an unreinstated striker, and there is no evidence that the Respondent did not have Taylor's correct address. The record shows only that Taylor did not return to work after the Respondent attempted to recall her.

Moreover, contrary to the judge's further statement in sec. III,B, the record shows that the Respondent stipulated that there were employees on the unreinstated striker list who were "qualified to perform the jobs of certain of the laid off employees, striker replacements." These inadvertent errors are insufficient to affect the results of our decision.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by its August 1982 letter to unreinstated strikers threatening cutoff of reemployment rights should they fail to furnish written notice within 5 days of intention to retain these rights, we rely solely on the fact that the threat of termination was contained only in the letters to unreinstated strikers and not in similar letters it sent to laid-off striker replacements. Accordingly, we find it unnecessary to rely on the judge's discussion of *Charleston Nursing Center*, 257 NLRB 554 (1981), for the proposition that an employer may never require replaced strikers to respond to such a request at the risk of losing reinstatement rights.

We shall dismiss the allegations that this conduct also was violative of Sec. 8(a)(3) and (5). We note the absence of any evidence that the Respondent adversely altered the reinstatement rights of the strikers who did not respond to the letter and the absence of any evidence that the Respondent unilaterally changed their terms and conditions of employment.

Regarding the May-August 1982 recalls from layoff, we note that the Respondent's production and maintenance employees commenced an economic strike in March 1980. In April 1980, the Respondent began hiring permanent replacements for its striking employees. The strike ended in August 1980 when the Respondent executed a new collective-bargaining agreement which included a strike settlement agreement. The agreement provided, in pertinent part, that the strikers were deemed to have made an unconditional offer to return to work and they would be returned to work as job vacancies occurred. At the time, the Respondent had some 94 employees, composed of 69 permanent striker replacements and 25 former strikers who had abandoned the strike. In December 1981, the parties negotiated a new collective-bargaining agreement and, while the provisions were not included in the later contract, they agreed to abide by the provisions of the earlier agreement pertaining to the reinstatement rights of strikers. Since the end of the strike and through the hearing before the judge, several replacements had terminated their employment and the Respondent had recalled strikers to replace them. The Respondent has not hired any new employees.

In March 1982, the Respondent had a workforce of 88 employees. It then laid off 15 employees, 14 of whom were striker replacements. In May 1982, it laid off another employee. There had been no layoffs at the Respondent's facility since 1973, except for one brief layoff 6 or 7 years before. At the time of the March 1982 layoff, the Respondent's manufacturing manager, Neil Bone, advised the employees in a group that owing to a lack of work they were being laid off. He said that their life insurance would be canceled on March 26 and their medical insurance would be canceled after April 30; he advised the employees to look for another job or put in for unemployment; and he said that the layoff was for an indefinite period. On the same date as the group meeting, the Respondent sent letters signed by Fabrication Foreman Ken Stokes to the employees to be laid off indicating

that "due to the current economic business conditions, the [Respondent] is forced to reduce its work force." The letter then noted the upcoming cancellations of various insurance coverage and concluded: "Please make sure that your current address on file is your correct address as your last paycheck and any recall correspondence will be mailed to the address on file." It also indicated that "[the Respondent] will make every effort to return you to work as soon as possible. If you have any questions, please contact me." Bone testified that he had participated in the decision to lay off employees in March 1982 and that he did not know at the time the decision was made how long the layoff would last because the economic situation was bad. Bone testified at the hearing in November 1982 that there had not been too much change since the layoffs.

In May 1982, however, the Respondent began recalling certain employees from layoff. It recalled one employee, who was a striker replacement, in May; it recalled another employee in July and two in August. Of the three recalled in July or August, two were striker replacements. It then laid off another employee in October. In recalling the employees, the Respondent did not consider recalling any of the remaining unreinstated strikers. The Respondent took the position that its layoff of replacements did not create any vacancies to which the unreinstated strikers were entitled to be recalled. Alternatively, the Respondent contended that even if the layoffs did create vacancies, the Union had waived the strikers' rights to recall to their positions in the strike settlement agreement.

The judge concluded that the Respondent had violated Section 8(a)(3) by maintaining and enforcing a policy which effectively afforded replacements superseniority over unreinstated strikers. The judge noted that economic strikers who have been permanently replaced but who unconditionally offer to return to work are entitled to be reinstated upon the departure of the replacements. *Laidlaw Corp.*, 171 NLRB

1366 (1968).[3] The judge found that the replacements' layoff for a prolonged, indefinite period did constitute their departure from the Respondent. Accordingly, he found that the later reopening of positions constituted vacancies to which the unreinstated strikers were statutorily entitled to be recalled over less senior laid-off replacements. He distinguished this case from *Bancroft Cap Co.*, 245 NLRB 547 (1979), in which positions opening up after certain layoffs were found *not* to be "vacancies" which the employer was obligated to offer to unreinstated strikers. The judge noted that the layoffs at issue in *Bancroft* were of short duration and due to a shortage of material, hence not resulting in the "departure of replacements." It was thus distinguishable from the instant case in which, he concluded, the layoffs were prolonged and for an indefinite period leading, in the judge's estimation, to the "departure of replacements" under *Laidlaw*. The judge further rejected the Respondent's contention that, in the strike settlement agreement, the Union had waived the strikers' rights to recall in these circumstances. The judge noted that in negotiating that agreement the parties had not discussed the recall rights of unreinstated strikers in the event that the replacements were laid off.

As noted above, we agree with the finding of a violation but we do so for the following reasons. We note initially that we disagree with the judge's analysis of this issue insofar as he reasoned that an economic layoff of permanent replacements for a prolonged indefinite period is per se a vacancy that triggers the unreinstated strikers' *Laidlaw* rights.[4] In this regard, we find that this analysis fails to satisfactorily take into account the employer's right to permanently replace economic strikers and to assure the replacements of the permanency of their positions. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). A

[3] Enfd. 414 F.2d 99 (7th cir. 1969), cert. denied 397 U.S. 920 (1970).

[4] For the reasons relied on by the judge, we agree with his conclusion that the Union did not waive the strikers' recall rights in the strike settlement agreement.

replacement could hardly be called "permanent" were we to find that every layoff for an indefinite period creates a vacancy which activates a striker's reinstatement rights. See *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (1982), denying enf. 255 NLRB 93 (1981).

On the other hand, a strike also does not terminate the employment relationship of a striker. Thus, Section 2(3) of the Act provides that an individual whose work ceases as a result of a labor dispute remains an employee if he has not obtained any other regular or substantially equivalent employment. Clearly, replaced economic strikers who unconditionally offer to return to work are entitled to reinstatement upon the departure of replacements unless the former strikers have acquired regular and substantially equivalent employment or the employer can sustain its burden of proving that its failure to offer reinstatement was for legitimate and substantial business reasons. *Laidlaw*, supra. Thus, the key question presented in cases involving the layoff of permanent replacements is whether the layoff in fact signified the departure of the replacements under *Laidlaw* with the consequent creation of a vacancy which triggers the strikers' rights to reinstatement when the vacated position again opens up. This issue appears to be an open question[5] which we resolve today in the following manner.

We find that the proper resolution of the question whether the layoff of a permanent replacement signifies the departure of the replacement under *Laidlaw* must be achieved by

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[5] See, e.g., *Medallion Kitchens*, 275 NLRB 58 fn. 2 (1985), enfd. 806 F.2d 185 (8th Cir. 1986). There is some brief discussion of the issue at fn. 1 of *Bancroft Cap*, supra.

properly balancing each of the rights identified above. As noted by the Supreme Court in discussing a related issue in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967): "It is the primary responsibility of the Board . . . to 'strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" (Quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).) We find that such a balance can be struck in the following fashion. When it is alleged that an employer has violated Section 8(a)(3) by recalling laid-off permanent replacements ahead of unreinstated strikers, we shall require the General Counsel to first establish a prima facie case that the layoff truly signified the departure of the replacements under *Laidlaw* and thus created vacancies to which the unreinstated strikers were entitled to be recalled. In this regard, the General Counsel will be required to show that a strike has occurred; that the strikers have made an unconditional offer to return to work; that a layoff of permanent striker replacements has occurred; that the replacements were recalled from layoff instead of the former strikers; and that, based on objective factors, the laid-off permanent replacements had no reasonable expectancy of recall. Cf. *Bancroft Cap Co.*, 245 NLRB 547 fn. 1. The objective factors relevant to the replacements' reasonable expectancy of recall would include, inter alia, evidence concerning the employer's past business experience, the employer's future plans, the length of the layoff, the circumstances of the layoff, and what the employee was told regarding the likelihood of recall. See, e.g., *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983); *Bancroft Cap*, supra. Once the General Counsel has established a prima facie case that a *Laidlaw* vacancy exists to which the striker is entitled, the burden shall shift to the employer to show that in fact no such *Laidlaw* vacancy occurred or that its failure to recall the striker was otherwise based on legitimate and substantial business justifications, such as those identified in *Fleetwood Trailer*, supra, 389 U.S. at 379. In this fashion, we shall properly balance the strikers'

Laidlaw rights against the employer's *Mackay* rights.[6] We do not deem the burden placed on the General Counsel to be inconsistent with the *Laidlaw* principle that an economic striker who has been permanently replaced but who unconditionally offers to return to work is entitled to be reinstated upon the departure of a striker replacement. We do conclude that to activate that right the General Counsel must present a prima facie case that the replacement's departure has created such a *Laidlaw* vacancy.

Turning to the case at hand, we find that the General Counsel has established a prima facie case that the Respondent's March 1982 layoff of the replacements created vacancies to which the unreinstated strikers were entitled to be recalled when the positions subsequently opened up. Thus, we conclude that the General Counsel has met the burden of establishing that those laid off had no reasonable expectancy of recall when laid off. In this regard, we note that

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[6] Our concurring colleague disagrees with our analysis and would allocate the parties' respective burdens differently. In this regard, he would not require the General Counsel to establish the existence of a vacancy as an element of the violation alleged, but would require that the employer prove that a vacancy did not exist as justification for failing to recall a striker. Contrary to our colleague's contention, neither *Laidlaw* nor *Fleetwood Trailer* supports the allocation of burdens in this fashion. Both cases are factually distinguishable, and neither addresses the *precise* question presented here, i.e., whether the layoff of a *permanent* replacement creates a vacancy to which an unreinstated striker must be recalled upon the employer's restaffing the position. In both *Laidlaw* and *Fleetwood Trailer*, "vacancies" clearly existed and, accordingly, the respective employers could not lawfully engage new hires rather than recall their unreinstated strikers absent legitimate and substantial justification. (We of course retain the *Fleetwood* rule that the initial burden is on the employer to show that the replacements in question were in fact permanent.) Our colleague points out that an employer generally will have superior knowledge of the facts underlying its layoff of replacements. We acknowledge that this is so, but find it insufficient to warrant allocating the burdens as our colleague would do. In this regard, we note that virtually every respondent in every unfair labor practice case may have superior initial knowledge of the facts underlying its actions which are alleged to be in violation of the Act. This, however, never relieves the General Counsel of her burden of establishing all elements of the violation alleged.

employees were advised that the layoff was due to a lack of work and for an indefinite period, that their insurance benefits were to be canceled, and that they should look for another job or apply for unemployment compensation. We find that this evidence establishes that, based on objective factors, those laid off had no reasonable expectancy of recall at the time of the layoff. See, e.g., *High Energy Corp.*, 259 NLRB 747, 761-762 (1981). We acknowledge that the Respondent mailed a letter to those laid off indicating that the Respondent would make every effort to return them to work as soon as possible. We do not, however, view this vague representation as sufficient to undermine the evidence noted above establishing that those laid off did not have a reasonable expectancy of recall. *Tomadur, Inc.*, 196 NLRB 706 (1972).

We thus conclude that the General Counsel has established a prima facie case that the layoff created *Laidlaw* vacancies to which the unreinstated strikers were entitled. Accordingly, the Respondent is obliged to show that no *Laidlaw* vacancy occurred or that its failure to recall the strikers was based on legitimate and substantial business justification. We note that the Respondent has argued only that the Union waived the strikers' rights to reinstatement. In these circumstances, we conclude that the Respondent has not met its burden.[7] Accordingly, we agree with the judge's conclusion that the Respondent has violated Section 8(a)(3) by recalling replacements before unreinstated strikers.

ORDER

The National Labor Relations Board orders that the Respondent, Aqua-Chem, Inc., Cleaver Brooks Division, Greenville, Mississippi, its officers, agents, successors, and assigns, shall

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[7] As noted, we agree with the judge's conclusion that the Union did not waive the strikers' recall rights.

1. Cease and desist from

(a) Refusing to reinstate Henry Holmes and other unreinstated strikers to their former or substantially equivalent positions when jobs were available following their unconditional application to return to work.

(b) Threatening to terminate the recall rights of economic strikers if they fail to renew their request for reinstatement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Henry Holmes and any other unreinstated strikers who have been denied reinstatement to positions available following their unconditional applications to return to work, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Henry Holmes and any other unreinstated strikers who have been denied reinstatement to available positions following their unconditional applications to return to work for any loss of earnings and other benefits suffered as a result of the discrimination against them by payment to each of them of a sum of money equal to the amount he/she normally would have earned from the date of the discrimination to the date of Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[8]

[8] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 6 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Greenville, Mississippi facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER JOHANSEN, concurring.

I agree with my colleagues that the Respondent unlawfully denied recall to unreinstated strikers ahead of laid-off striker replacements in violation of Section 8(a)(3) and that its August 1982 letter to the strikers further violated Section 8(a)(1). I write separately, however, to express my disagreement with a test that places the burden of proving "vacancies" on the General Counsel where it is shown that the striker replacements have been placed on prolonged and indefinite layoff and the strikers have unconditionally offered to return to work.

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

As the Supreme Court has explained in *NLRB v. Fleetwood Trailer Co.*,[1] if an employer refuses to reinstate striking employees after they have unconditionally offered to return to work,

> the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice.

Thus, recognizing the potential for deleterious consequences to the exercise of fundamental Section 7 rights, the Court and the Board have consistently placed the burden on the employer to show that its replacements are permanent. Both *Fleetwood* and *Laidlaw Corp.*, 171 NLRB 1366 (1968), hold that a former striker's "right to the job does not depend on its availability at . . . application, and the strikers are *entitled to reinstatement* absent substantial business justification. . . ."[2] Further, the Court has specifically rejected the notion that it is the General Counsel's burden

> to show "that the jobs of complainants ha[ve] not been absorbed or that they are still available." Such proof is not essential to establish an unfair labor practice. It relates to justification and the burden of such proof is on the employer.[3]

In the face of precedent plainly establishing that "[t]he burden of proving justification is on the employer,"[4] the majority requires the General Counsel to establish as part of

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[1] 389 U.S. 375, 378 (1967), quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

[2] *Laidlaw*, 171 NLRB at 1369 (emphasis in original).

[3] *Fleetwood*, supra at 378, fn. 4, quoting *NLRB v. Great Dane Trailers*, supra at 34.

[4] Id. at 378.

her prima facie case that replacements have departed without reasonable expectancy of recall. This requirement is said to be based on an accommodation of the employer's right to assure permanency to its replacements under the *Mackay Radio* doctrine.[5] First, nothing in *Mackay Radio* suggests that striker replacements should be extended assurances of permanency superior to those accorded other employees subject to layoff, such as nonstriking employees or reinstated strikers.

Second, this allocation of burdens disregards the fundamental evidentiary principle that "the burden of proving a fact is said to be put on the *party who presumably has peculiar means of knowledge* enabling him to prove its falsity if it is false."[6] Whether a striker's job has been filled by a permanent replacement and whether the layoff of that replacement has created a vacancy are, ultimately, questions of fact. The relevant facts are peculiarly within the knowledge of the employer and the replacement, both of whom are allied in interest against the General Counsel. The strength of their alliance is borne out in a number of Board decisions[7] and calls into question the inherent reliability of the evidence on which the majority asserts it would rely to establish whether the General Counsel's burden has been met—i.e., evidence of what the replacement was told bearing on the reasonableness of his expectancy of recall.[8]

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[5] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[6] Wigmore 9 *Evidence* § 2486 (Chadbourn rev. 1970).

[7] See, e.g., *Ace Drop Cloth Co.*, 178 NLRB 664 (1969) (employer's claim rejected that a vacancy was temporary where replacement on maternity leave expressed no intentions to return to work), *Wisconsin Packing Co.*, 231 NLRB 546 (1977) (employer's claim rejected that terminated replacements whom it contacted to fill vacancies instead of unreinstated strikers were on "leaves of absence").

[8] In contrast, no such motivation affects the reliability of this evidence when it is submitted to support the determination of voting eligibility of laid-off employees in a Board election. See, e.g., *Higgins, Inc.*, 111 NLRB 797, 799 (1955).

Twenty-five years ago, the Court in *NLRB v. Erie Resistor,*[9] declined to extend its holding in *Mackay Radio* to sanction superseniority for striker replacements, deferring there to the "generous interpretation" of the right to strike Congress expressed in Section 13 of the Act:[10]

> [A] strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.[11]

Because the reallocation of burdens set forth in the majority opinion will disturb the balance of the economic weaponry established by Congress and preserved in Court and Board opinions defining the rights of strikers and their replacements, I cannot accept their analysis.

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[9] 373 U.S. 221 (1963).
[10] Id. at 234.
[11] Id.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate Henry Holmes and other unreinstated strikers to their former or substantially equivalent positions when jobs are available following their unconditional application to return to work.

WE WILL NOT threaten to terminate the recall rights of economic strikers if they fail to renew their request for reinstatement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Henry Holmes and any other unreinstated strikers who have been denied reinstatement to positions available following their unconditional application to return to work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substan-

tially equivalent positions without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings or benefits suffered by reason of the discrimination against them less any net interim earnings, plus interest.

AQUA-CHEM, INC., CLEAVER BROOKS DIVISION

Karen M. Clayborne, Esq., for the General Counsel.
James F. Honzik, Esq. (Lindner, Honzik, Marsack, Hayman & Walsh), of Milwaukee, Wisconsin, for the Respondent.
Curtis Orman, of West Point, Missouri, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

PHILIP P. McLEOD, Administrative Law Judge. This case was heard before me on November 3 and 4, 1982, in Greenville, Mississippi. It originated from a charge filed on July 23, 1982, and later amended on August 31, 1982, in the above-captioned case against Aqua-Chem, Inc., Cleaver Brooks Division (Respondent), by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO (the Union).

On September 9, 1982, a complaint and notice of hearing issued alleging that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. In its answer to the complaint, Respondent admitted certain allegations, including the filing and serving of the charge, its status as an employer within the meaning of the Act, the status of the Charging Party as a labor organization within the meaning of the Act, and various facts regarding the history of collective bargaining between Respondent and the Union. Respondent denies having engaged in any conduct that would

constitute an unfair labor practice.

At the trial all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, both Respondent and the General Counsel filed timely briefs, which have been duly considered.

On the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and Respondent admits, that Aqua-Chem, Inc., Cleaver Brooks Division is a corporation with an office and facility in Greenville, Mississippi, where it is engaged in the manufacture of boilers. In the course and conduct of its business, Respondent annually sells and ships from its Greenville facility products, goods, and materials valued in excess of $50,000 directly to points located outside Mississippi. Respondent also annually purchases and receives at its Greenville, Mississippi facility products, goods, and materials valued in excess of $50,000 directly from points located outside Mississippi.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Allegations and Issues*

The primary issue in this case relates to Respondent's admitted failure to reinstate economic strikers to work when positions became available at various times following the conclusion of an economic strike. Respondent argues that its failure to offer available positions to unreinstated economic strikers did not constitute an unfair labor practice because laid-off permanent replacements were available and because the Union waived the rights of strikers to these positions in its strike settlement agreement with Respondent. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by sending a letter to unreinstated strikers advising them that their reinstatement rights would be terminated if they did not respond within 5 days of receiving the letter. Respondent argues that it had substantial business justification for sending the letter to unreinstated strikers and consequently its actions did not violate the Act. The General Counsel also argues that by sending the letter referred to above, Respondent altered the employment status of those employees who did not respond, thereby violating Section 8(a)(3) of the Act and that because Respondent sent the letter without first notifying and affording the Union an opportunity to negotiate and bargain with respect to it, Respondent violated Section 8(a)(5) of the Act. Respondent denies these additional and/or alternative theories advanced by the General Counsel.

B. *The Facts*

The facts proffered by the General Counsel in support of its position are relatively simple and are in large part uncontested. Since March 1976, the Union has been the exclusive collective-bargaining representative of Respondent's production and maintenance employees at its Greenville, Mississippi facility. Respondent and the Union have been parties to past successive collective-bargaining agreements. In

January 1980 Respondent and the Union began negotiations for a new agreement to succeed the one which was to, and did, expire on March 5, 1980. When this agreement expired, a strike began on March 6, which was participated in by all the approximately 106 unit employees. Although it initially shut down all production, on April 28, 1980, Respondent reopened its facility and began hiring permanent replacements.

The strike terminated on August 11, 1980, at which time the parties executed a "strike settlement agreement." This "strike settlement agreement" consisted of three parts. The first part contained substantive provisions of a new collective-bargaining agreement. The second part contained provisions regarding the recall of strikers to work. The third part dealt with discipline of certain strikers for having engaged in alleged strike misconduct. The terms of this agreement are discussed in greater detail below. This strike settlement agreement expressly confirmed that the strike was terminated and that striking employees were considered to have made an unconditional offer to return to work. At the time this agreement was negotiated on August 11, Respondent was operating with 69 permanent replacements and 25 employees who had abandoned the strike and returned to work.

Since the end of the strike on August 11, 1980, Respondent has hired no new employees. Over the ensuing months, several of the strike replacements left for various reasons and were replaced by yet-unreinstated strikers.

As the August 1980 collective-bargaining agreement was approaching its expiration, the parties, on December 4, 1981, amiably negotiated a new collective-bargaining agreement effective from December 6, 1981, through December 5, 1984. Sections 2 and 3 of the August 11, 1980 strike settlement agreement regarding reinstatement of strikers and discipline of certain employees were not included in that later agreement. In conjunction with that later agreement, however, the parties on December 5, 1981, agreed to continue to abide by

those provisions defining recall rights of unreinstated strikers contained in the August 1980 strike settlement agreement.

As of March 27, 1982, Respondent had a work force of 88 individuals, 33 of whom were strike replacements. On March 27, Respondent laid off 15 of the 88 employees. Fourteen of those laid off were strike replacements. Employees laid off were told that Respondent's economic picture was bad, that their life insurance and medical insurance would be canceled, and that the layoff was indefinite. In testimony, Respondent confirmed that this was an accurate representation of its economic situation at the time. On May 25, 1982, Respondent laid off an additional employee for the same reason.

On May 26, 1982, Respondent recalled Larry Evans, a strike replacement classified as a machine operator. Three other employees were recalled by Respondent on July 26 and August 2 and 9, 1982. Two of these were strike replacements. On October 4, 1982, Respondent indefinitely laid off yet another employee for lack of work.

Respondent stipulated that in making the recalls on May 26, July 26, and August 2 and 9, it did not consider any of the 28 yet-unreinstated strikers for those positions. Respondent further stipulated that the unreinstated striker list, containing the names of 28 yet-unreinstated strikers, includes individuals who are qualified to perform the jobs of laid off strike replacements who were later recalled.

The facts advanced by the General Counsel in support of its other allegations are also uncontested. On August 18, 1982, Respondent sent a letter to all 28 unreinstated strikers. The letter reads in its entirety:

> You have not been at work at Cleaver Brooks, Greenville since March 6, 1980, when the Union began a strike at that location. The Company and Union have entered into a strike settlement Agreement which grants you reinstate-

ment rights under certain conditions. This is a specific request to you to notify the Company in writing whether you desire to maintain your recall (reinstatement) rights with the Company. You can do so by mailing a letter to the plant or by coming in and signing a memo to that effect. If the Company does not hear from you within five workdays of your receipt of this letter, it will take your name off the unreinstated striker list and your employment rights at the Company will be terminated.

Respondent did not consult with or notify the Union before sending this letter. The letter was sent only to unreinstated strikers. No similar letter was sent to laid-off strike replacements. Twenty of the 28 yet-unreinstated strikers received their copy of this letter. Of those 20 who received the letter, 4 did not contact Respondent as requested. Of the eight who did not receive copies of the letter, one individual apparently heard about the letter through some other source, because that individual contacted Respondent. Seven of those eight, however, did not contact Respondent.

The relatively simple facts found above constitute the substance of the General Counsel's case. Respondent argues that its failure to offer positions to unreinstated strikers in the May, July, and August 1982 recalls from layoff did not constitute an unfair labor practice because laid-off permanent replacements were available and because the Union waived the rights of strikers to these positions in the August 1980 strike settlement agreement with Respondent. Much of the testimony in this case relates to the August 1980 strike settlement agreement and negotiations preceding it regarding Respondent's position that the Union waived rights that strikers may have had to these positions. I find as follows:

After the strike had been in progress for 3 months, and Respondent had hired several permanent replacements, Respondent and the Union met on June 5, 1980, in the presence of a mediator in order to continue negotiations. At this meeting, Respondent's primary spokesman was Thomas

J. Toole, vice president of personnel and industrial relations. The Union's primary spokesman was Curtis Orman, International representative. At this meeting, Toole submitted a written proposal on behalf of Respondent which contained three sections. The first contained Respondent's prestrike proposals regarding substantive contract provisions. The second contained a procedure for the reinstatement of strikers, and the third contained a proposal regarding discipline for strikers alleged to have engaged in strike misconduct. The second section, regarding the reinstatement of strikers, reads in its entirety:

> The parties recognize that the Company has hired permanent replacements. Upon abandonment of the strike employees will be returned to work as job vacancies occur. Employees shall be returned to a job position when it becomes vacant. (a) The employees will be returned by their Department Classification Seniority in the Department in which the vacancy occurs provided the employee has the present ability to immediately perform the work available. (b) Prior to hiring new employees when there are no employees with the present ability to immediately perform the work available with Department Classification Seniority in the Department then the most senior employee possessing the present ability to immediately perform the work shall be offered the job. (c) If no employee is available under (a) and (b) hereof the employer may hire new employees who are able to immediately perform the work available or prior to hiring new employees who need to be trained return the most senior employee who possesses the same basic requirements necessary for such training as would apply if the Company were hiring new employees. The intent of this provision is to return employees to work while the Company maintains efficient operations. An employee who fails to return to work within five work days of notification by certified mail to the last address given to the Company by the employee of available work under this procedure or who refuses to take a job of-

fered under this procedure shall forfeit all future reemployment rights.

No part of Respondent's June 5 proposal was accepted by the Union at this meeting. Regarding the reinstatement of strikers, Orman informed Toole that the Union wanted a guarantee of unconditional reinstatement of all strikers immediately. Respondent, who had already hired a substantial number of permanent replacements, would not agree to this. Toole and John Plant, Respondent's operations manager, assured the Union that the recall provision for strikers contained in Respondent's proposal would enable strikers to return to work before anyone else was hired. Toole also assured Orman that Respondent's proposal meant no new employees would be hired if there were unreinstated strikers with the ability to perform needed work.

Toole testified that at the June 5 meeting there was discussion regarding the words "as vacancies occur" found in Respondent's proposal. Toole testified that he and Plant stated these words meant that Respondent would guarantee strikers would be returned to their jobs and regain their seniority before Respondent hired any other employees or moved people within the plant through job posting to a higher or different job classification. Orman testified that the word "vacancy" was never defined during negotiations and that the term "vacancy" as used in the strike settlement agreement was never discussed in relation to language used in any substantive contractual provision. I credit Orman. It is clear that the Union's immediate and consistent reaction to Respondent's proposal regarding reinstatement of strikers throughout the June 6 meeting was to insist on immediate reinstatement of all strikers. There was simply no reason for the parties to engage in discussion regarding the specific meaning and limitation of the term "as vacancies occur." It is clear from the testimony, including that of Toole himself, that while Respondent at the June 5 meeting may have made certain assurances that its striker reinstatement proposal would guarantee certain rights to strikers, it did so only in

positive terms and not by way of circumscribing or limiting the reinstatement right of strikers. Thus, I find that while Respondent gave such assurances, it did not do so in the context of limiting, or even defining, the term "as vacancies occur." As previously indicated, the parties did not reach any agreement on any portion of Respondent's proposal at this meeting.

After the June 5 meeting, Leonard Beauchamp, another International representative, became involved in negotiations. Thereafter, Beauchamp served as the Union's primary spokesman. From June 5 until the next negotiation session, held on August 11, 1980, Beauchamp and Toole had several telephone conversations in which they attempted to work out the parameters, and later the details, of a collective-bargaining agreement. Both Toole and Beauchamp testified concerning these telephone conversations. Although on direct examination Toole attempted to testify regarding the substance of these conversations, he later admitted that he could not testify with regard to any specific conversation without first referring to notes he had taken during the conversation. Toole testified that he was very careful to take accurate notes during these conversations and that his notes in many cases represented exact quotes of what was said. I have carefully examined the notes, which were introduced as exhibits herein. The notes are both lengthy and detailed, and in many instances I consider them to be better evidence of what took place during some of those conversations than the testimony of either Toole or Beauchamp. The notes reflect that telephone conversations took place between Toole and Beauchamp on July 1, 3, 10, 11, 16, 22, 23, 28, and 31 and August 1, 4, and 7.

The vast majority of these conversations related solely to substantive contractual matters and have no special relevance to this case. The notes as a whole reflect that the length of the proposed contract was a major issue between the parties. Toole's notes of the conversation that took place on July 1, for example, contains the following statement:

Term of agree[ment] is as critical as method of Returning [strikers].

The notes, however, do also reflect considerable detail regarding the return of strikers to work. The notes of the conversation which took place on July 3 reflect that Toole opened the discussion regarding the return of strikers to work by telling Beauchamp that Respondent was not trying to break the Union, that the Union was trying to break itself, and that if the Union continued to turn down Respondent's June 6 proposal it was forcing Respondent to hire more replacements. The next conversation, which took place on July 10, was devoted largely to discussion regarding the return of strikers to work. Toole remarked that Beauchamp and employees both had told him that the primary problem was *when* employees would return. Toole observed that various people had suggested 10 strikers be returned to work immediately. Toole then said that Respondent had considered this as well as its business needs and that it did need "a few more people now." Toole told Beauchamp that Respondent had the option of hiring more replacements or working with the Union in order to return a few strikers to work. Toole's notes then contain the following:

Proposal:

We need a few people. I'm talking five now. As a *guarantee.*

Perhaps more later as business improves—but I will not guarantee that.

Five is door opener—It gives you Union representation. (one of first five is on Comm.)

—this is between you and I.

—you come to us through mediator with proposal that if five emp are returned you can deliver a ratified contract—we'll accept.

Later notes of that same conversation contain the following:

If you accept now
—workers get guaranteed return procedure.
—guarantee of five
—more will come if business [improves]
If you don't accept—you'll force us to hire *more* replacements.

The notes of this conversation reflect no response by Beauchamp to Toole's remarks. Notes of their conversation on July 22, however, reflect that the Union again rejected Respondent's June 6 proposal, including that portion relating to the return of strikers. The notes of that conversation vividly reflect that the Union's primary concern related to the length of the proposed contract. Respondent was insisting on a contract of no more than 1 year. The Union saw that as an attempt by Respondent to lay the groundwork for ousting the Union at some point in the future. Consequently, the Union demanded a contract of at least 2 years. The following statements contained in Toole's notes clearly reflect the position of the parties at the end of that conversation:

Local people won't accept—"just anything." They recognize they may *never* get back.

. . . .

We're back to square one. Is company willing to adjust term of agreement. "Then we got to go to war."

. . . .

If you won't change position on term—its war. I'll go down fighting.

On the next day, July 23, Toole and Beauchamp had another conversation. The notes of that July 23 meeting suggest that there was a much different tone to the conversation. Specifically, Respondent made a new offer. Of particular significance was the fact that Respondent proposed to extend the term of the contract to 21 months. Regarding the return of strikers, Toole's notes contain the following as the fifth part of its new proposal:

Procedure for returning strikers—As outlined in 6—5—80 procedure. Respondent promises "five emp" return within one wk of U ratification of this *final* move.

The final portion of Respondent's July 23 proposal contains the following statement:

We [Respondent] want from you:
(a) *pre* ratification assurance.
(b) Union calls mtg and proposes this deal to company—through FMCS.
(c) If proposed *to* us in this manner you have my assurance of our acceptance.

From Toole's notes, it appears that the July 23 conversation was devoted exclusively to Toole outlining the new proposal as described above. Notes of the July 28 conversation reflect it was in that conversation Beauchamp responded to Respondent's new proposal. In the July 28 conversation, Beauchamp told Toole there was no way the Union could accept Respondent's proposal "as proposed." Beauchamp told Toole they could work it out, but that there were some problems. The first problem had to do with the fact that Respondent's proposal called for the new contract to expire just before Christmas. The second problem had to do with the call-back procedure of strikers. Toole's notes contain the following statements.

Call Back Procedure.
They have questions—this is equal or substantial employment. i.e.—call back to janitor if they refuse—they'll . . . .
They think we'll maneuver around it.
Lynn wants Strike Settlement agreement to "Say what law says"
(abandonment of strike.)

It appears from Toole's notes that after Beauchamp explained the problem the Union had with Respondent's pro-

posal, the conversation terminated.

The next conversation between Beauchamp and Toole took place on July 31. A large part of that conversation had to do with discipline of strikers alleged to have engaged in strike misconduct and the fact that the wage increase proposed by Respondent was to be prorated over the remainder of calendar year 1980. Regarding the return of strikers to work, the first page of notes of that conversation reflects the following:

> *PROB*
> "People not understanding"
> RTN TO WORK—No real prob.
> Using words they're not familiar w/
> "present ability to Immed perform" LB-Quest. of Reassurance.
> Ability & sen.—we'll have no problem there.
> RTN TO WORK Procedure is Contrary to Contract—layoff Recall Procedure.
> *Most* would come back.

Toole's notes reflect that he and Beauchamp then discussed the discipline of people alleged to have engaged in strike misconduct and, later, the prospect of prorating the proposed wage increase.

In a conversation on August 1, Beauchamp formally replied to Respondent's new proposal. Toole's notes reflect that Beauchamp's response contained a proposed modification regarding the recall of strikers to work. In this particular instance, however, Toole's notes are understandable only by referring to the testimony of Toole and Beauchamp. As already indicated in some of the notes quoted above, Beauchamp had expressed objection to Respondent's proposal regarding the return of strikers to work because, in Beauchamp's view, it did not allow strikers the same rights they had under the law and the prior contract between the Union and Respondent. Specifically, Beauchamp's complaint was that pursuant to the terms of the contract an employee

on layoff, when recalled to work, had the right to refuse a lower grade job and still retain reinstatement and seniority rights. Beauchamp wanted strikers who were recalled to work to have the same right that employees on layoff had under the contract. Toole testified, and his notes reflect, that he responded to Beauchamp by telling Beauchamp that section 5.7 of the collective-bargaining agreement, which defines the rights Beauchamp was referring to, applied only to layoffs and not to the return of strikers. Toole told Beauchamp that the rights of unrecalled strikers would be those contained in the language of Respondent's June 5 proposal, not the collective-bargaining agreement.

Toole's notes regarding the August 1 conversation and later conversations of August 4 and 7, tend to be less detailed and more sketchy than his notes of earlier conversations. This may well be due to the fact that the parties were getting closer to reaching agreement. I credit Beauchamp that he proposed additional language be added to the strike settlement agreement to protect the strikers' right to refuse a lower grade job and still retain seniority and reinstatement rights. The additional language that Beauchamp proposed, i.e., "within the same job grade," was agreed to and appears in the final strike settlement agreement. Beauchamp was also concerned whether strikers would continue to accrue seniority while awaiting recall and what seniority strikers would have once they returned to work, and I credit Beauchamp that he discussed these concerns with Toole. Beauchamp told Toole that the Union wanted strikers to be able to continue to accrue seniority while awaiting reinstatement. This was rejected by Respondent. Beauchamp then proposed that once strikers returned to work their seniority dates would be that which they held prior to the commencement of the strike, thereby assuring in the future that their seniority would include the period of the strike. In order to clarify these rights, Beauchamp proposed additional language be added to the recall procedure. This language, which is found in the final strike settlement agreement, provides:

> The seniority of returned strikers shall be that which they held prior to the strike. The seniority of replacements shall be that of their date of hire.

The final negotiation session occurred on August 11, 1980, at which time the parties executed a "strike settlement agreement." The Union was represented at the meeting by five individuals, including Orman and Beauchamp. Beauchamp continued to act as the Union's primary spokesman at that meeting. Respondent was represented by three individuals, including Toole, who remained Respondent's primary spokesman. As Toole had requested in the telephone conversation with Beauchamp, Beauchamp presented the offer which, after minor modifications, became the basis of the strike settlement agreement. Respondent insisted that the sentence, "The above wages and benefits are effective as of the signing of this agreement" be deleted, and it was. At the August 11 meeting, there was brief discussion regarding the procedure for recalling strikers. Beauchamp, who I credit, testified he made the statement at that meeting that it was his understanding of the striker recall procedure that for all purposes the strikers have seniority which would be greater than that of strike replacements unless some unreinstated strikers on the recall list were not recalled for a considerable length of time, in which case strike replacements might at some point catch up with unreinstated strikers as they were not accruing seniority until they returned to work.[1] The final

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[1] Beauchamp does not claim and there is no evidence to indicate that Respondent confirmed Beauchamp's understanding to be correct. I do not take Beauchamp's testimony to reflect a joint understanding about the meaning of the recall procedure. I do, however, consider it as evidencing the Union's understanding of that procedure and take that into account in determining whether the Union waived any statutory rights of employees. In crediting Beauchamp that he made the statement described above at the August 11 meeting, I note Toole testified that there was a discussion at some time to the effect that unreinstated strikers did not have seniority in the bargaining unit until they were reinstated, at which time they would assume all of their past seniority. I do not credit Toole that specific statement was ever made by either him or Beauchamp.

(cont'd)

agreement executed on August 11 contains three parts. The first part contains provisions regarding the substance of a collective-bargaining agreement that was to remain in effect for 20 months. The second contains provisions regarding the reinstatment of strikers. This section of the agreement is identical to Respondent's June 5 proposal except for the deletion of two words and the insertion of additions requested by Beauchamp in his telephone conversations with Toole described above. Section three of the final agreement is identical to the third section of Respondent's June 5 proposal regarding discipline of employees alleged to have engaged in strike misconduct. The August 11 agreement expressly confirmed that the strike was terminated and that striking employees were considered to have made an unconditional offer to return to work.

Analysis and Conclusions

The General Counsel argues that once it is established economic strikers have made unconditional offers to return to work, certain rights automatically accrue to them pursuant to the Board's well recognized and long accepted decision in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The General Counsel argues that one such *Laidlaw* guarantee is that an employer cannot discriminate against strikers with respect to seniority in layoffs solely on the basis of protected strike activity. *Transport Co. of Texas*, 177 NLRB 180 (1969); *Wisconsin Packing Co.*, 231 NLRB 546 1977. She argues that a recall procedure favoring laid-off strike replacements who have less seniority than unreinstated strikers without

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Rather, I conclude that the only statement made by either Toole or Beauchamp similar to that reported by Toole was during their telephone conversation in relation to whether unreinstated strikers would continue to accrue seniority for the period they were off work due to the strike and until such time as they were in fact returned to their jobs. I also note that both Beauchamp and Toole agree there was never any discussion concerning the rights of unreinstated strikers in the event of a layoff of strike replacements.

business justification amounts to an unlawful grant of superseniority to the replacements. *Giddings & Lewis*, 255 NLRB 93 (1981), enf. denied 675 F.2d 926 (7th Cir. 1982). The General Counsel argues that the Board's decision in *Giddings & Lewis* is determinative of the issue in this case.

Respondent's argument is more difficult to state simply. It is perhaps done best by quoting a portion of Respondent's brief in which it sets forth five enumerated arguments of law in capsulized version. The argument runs as follows: (1) "The Respondent could not hire new employees before reinstating strikers," citing *Laidlaw Corp.*, supra, (2) "Where there is good faith bargaining, employee reinstatement rights can be waived," citing *United Air Craft Corp.*, 192 NLRB 382 (1971), (3) "Unreinstated economic strikers are not laid off employees," citing *Bancroft Cap Co.*, 245 NLRB 547 (1979), (4) "A layoff does not create a vacancy," citing *Bancroft Cap Co.*, supra, (5) "The determination as to when a vacancy occurs 'must be viewed in the context of the practice and past considerations,'" citing *Bancroft Cap Co.*, supra. Respondent argues that during the 1980 negotiations with the Union, it succeeded in obtaining an agreement from the Union pursuant to which striking employees would be returned to work "prior to hiring new employees . . . as job vacancies occur." Respondent argues that it "has the right to enjoy the benefit it had negotiated which involved a waiver on the part of the Union."

A review of the cases in this area leads me to conclude that the General Counsel has the better argument. The starting point from which to analyze any case in this area must be the Board's decision in *Laidlaw*, supra at 1370 in which the Board held:

> Economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement *upon the departure of replacements* . . . . [Emphasis added.]

Relying on *United Air Craft Corp.*, supra at 385, Respondent argues that it has "the right to enjoy the benefit it had negotiated which involved a waiver on the part of the Union." I read the Board's decision in *United Air Craft Corp.* as being more limited. The Board therein stated:

> The Board is charged with the exclusive responsibility of vindicating the public policy as defined by Section 1 of the Act. It follows that the Board is not bound by any private adjustment of rights guaranteed by the Act. But it does not also follow that because the Board is not required to place its imprimatur upon private adjustments of statutory rights, it may not in the exercise of its discretion accept a particular private adjustment as conforming to the policy of the Act and therefore deserving of approval by the Board.

The Board then specifically considered the question "Whether to modify Respondent's obligation as defined in the recall agreement in view of *Laidlaw.*" After doing so, it then concluded, "In these circumstances, we believe that it will best effectuate the policies of the Act to adopt the agreement of the parties as determining the reinstatement rights of the economic strikers." Thus, the Board's decision in *United Air Craft Corp.* leaves to the Board whether to recognize a waiver of statutory rights which may be contained in a strike settlement agreement. The Board is not required to do so. I find it unnecessary, however, to consider whether the Board should recognize the agreement of the parties in this case if it were found to be a waiver of statutory rights. I am convinced that the record fails to establish that such a waiver occurred, but rather establishes the contrary.

Respondent's argument that a waiver of statutory rights occurred in this case is flawed in several respects. A great portion of Respondent's brief is devoted to the proposition that the term "vacancy" used in the recall procedure is defined by reference to the substantative collective-bargaining agreement and has the same definition as the term "job open-

ing" therein. I find no support for this argument. Rather, Respondent's argument contains a substantial internal inconsistency. Respondent argues that the "strike settlement agreement" was a complete, "interrelated" document while at the same time maintaining that the recall procedure itself is not a part of the labor agreement and, therefore, is not subject to the grievance/arbitration provision of the labor agreement. The testimony of vice president of personnel and industrial relations Toole most vividly reflects this inconsistency. Toole testified in part:

> The lay-off language of the contract pertains to recall of laid off employees. The strike settlement language pertains to the reinstatement of strikers and *the two are separate* and are governed by each situation. [Emphasis added.]

While not expressly stated as such, part of Respondent's argument is that a collective-bargaining agreement which gives laid-off employees rights superior to all other employees constitutes a waiver of strikers' rights and gives laid-off striker replacements rights superior to replaced strikers. Thus, Respondent argues that pursuant to the collective-bargaining agreement, "Laid off employees do have an *absolute right* . . . of recall during the period of seniority retention." The argument continues:

> Laid off employees were entitled to recall in the reverse order of their layoff. They remain employees, under the contract, until they lose seniority. There can be no vacancy under the contract as long as there is an employee holding a right to a job. This specific contract language is not applicable to unreinstated strikers because they are not laid off employees.

Respondent's logic at this juncture is flawed in two major respects. First, its substantial reliance on *Bancroft Cap Co.*, supra, for three of its five major arguments quoted above is entirely misplaced. These three arguments are drawn entirely from the administrative law judge's decision in that

case. Perhaps intentionally, Respondent's reference to this case completely ignores the Board's decision, particularly that part in which the Board states, "We qualify [the judge's] analysis regarding layoffs and vacancies . . . ." In that same portion of the Board's decision, the Board goes on to state:

> We rely particularly on the fact that the layoffs involved here were for periods of only 2 to 7 days and were due to shortages of materials. Thus, on the facts of this case, we agree with the Administrative Law Judge's conclusion that there were no vacancies which Respondent was obligated to offer to unreinstated strikers.

The Board's decision in that case stands for one very specific and very narrow point. Namely, that a layoff of very short duration due to a shortage of materials does not create vacancies which an employer is then obligated to offer to unreinstated strikers. To state it differently, such layoffs do not result in "the departure of replacements" as that term is used in the Board's *Laidlaw* decision. Respondent's citation to *Bancroft Cap Co.* for any other point is erroneous.

The second major flaw in Respondent's logic at this juncture is its failure to acknowledge requirements which both the Board and the courts have long held necessary for a waiver of statutory rights. It is not enough that there be some contractual provision which is arguably contrary to or inconsistent with statutory rights in order for there to be a waiver of such rights. Rather, the Board and Federal courts alike have consistently required that for an effective waiver of statutory rights to be found, there must be a "clear and unmistakable" intent expressed either in the language of the collective-bargaining agreement itself or at the bargaining table before the agreement is consummated. See *American Cyanamid Co.*, 185 NLRB 981 (1970); *Wisconsin Aluminum Foundry Co.*, 173 NLRB 1160 (1968), enfd. 440 F.2d 393 (7th Cir. 1971); *Weltronic Co.*, 173 NLRB 235 (1968); *Federal Compress & Warehouse Co.*, 166 NLRB 664 (1967), enfd. in relevant part 398 F.2d 631 (6th Cir. 1968); *Timken Roller Bearing*

Co., 138 NLRB 15 (1962), enfd. 325 F.2d 746 (6th Cir. 1963); *Perkins Machine Co.*, 141 NLRB 98 (1963); *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951). The same test is applied where an employer claims that a union has waived the statutory rights of employees to reinstatement on the termination of an economic strike. See *George Banta Co.*, 256 NLRB 1197 (1981), enfd. 686 F.2d 10 (D.C. Cir. 1982). My review of the negotiating sessions between the parties and the numerous telephone conversations between Toole and Beauchamp reveals no credible evidence on which to base a conclusion that the parties understood, discussed, or even assumed that the strike settlement agreement would exclude unreinstated strikers from reinstatement in the event of a layoff of replacements. Certainly it was agreed that no new employees would be hired if there were unreinstated strikers with the ability to do the work. This is unequivocally and expressly what the strike settlement provides. I find no waiver or limitation of statutory rights of recall, and certainly none that might be considered either clear or unmistakable. It is undisputed that there was no discussion concerning the recall rights of reinstated strikers in the event of a layoff of replacements. At the time of the 1980 negotiations, it had been 6 or 7 years since Respondent experienced a layoff, and the only classifications considered during those negotiations were returned strikers, replacements, and unreinstated strikers. It was Respondent who throughout negotiations insisted consistently and steadfastly that the collective-bargaining agreement and the provisions of the strike settlement agreement dealing with the reinstatement of strikers were separate and unrelated. I reject Respondent's argument that the recall rights of strikers, and the definitions of terms in the recall procedure, are now to be determined by reference to the collective-bargaining agreement. The record here reflects that there was no specific discussion between the parties during the 1980 negotiations regarding a layoff of replacements and the rights of unreinstated strikers. Thus, it is impossible to conclude that the parties reached a "clear and unmistakable" agreement regarding the rights of unreinstated strikers and laid-off replacements. It is

unknown whether the parties' failure to discuss this issue was due to oversight or, as is more likely, a failure to recognize its eventual importance. What is clear is that the parties did not negotiate a clear and unmistakable waiver of statutory rights. Statutory rights take precedence over contractual ambiguity. Ambiguous use of the term "vacancy" in the strike settlement agreement must therefore be controlled by the statutory definition of rights pursuant to the Board's decision in *Laidlaw Corp.* and cases that have followed it. In fact, in spite of all the convoluted arguments propounded by Respondent, the only real issue is whether the prolonged, indefinite layoff of strike replacements constitutes their "departure" under *Laidlaw.* My holding is a narrow one. I find that the prolonged, indefinite layoff of strike replacements does constitute such a departure, and that when more work becomes available for which additional employees are needed, a vacancy is created to which yet unreinstated strikers are entitled over less senior strike replacements.[2]

Based on all the above, I find that when the strike replacements were laid off under the circumstances present in this case, it constituted their "departure" as that term is used in *Laidlaw Corp.,* and a sufficient interruption of the employment relationship resulted such that unreinstated strikers were entitled to be given preferential consideration for future vacancies that might arise. The Union neither

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[2] Respondent spends some portion of its brief arguing that the Board erred in *Giddings & Lewis,* supra, and that the Seventh Circuit correctly overturned the Board's decision. This argument is, of course, misplaced for as an administrative law judge, I am required to follow Board cases where they are inconsistent with those of various circuit courts. I note too that the facts in *Giddings & Lewis* tend to distinguish it from the instant case. *Giddings* did not deal with an actual layoff of permanent strike replacements but rather with policies which the employer adopted and published to deal with the possibility of layoffs at some point in the future. Neither the Board nor the circuit court dealt with the question of whether the length and character of layoffs affect whether there is a departure of replacements pursuant to *Laidlaw.* In view of my limited findings in this case, I see no conflict necessarily arising between it and the circuit court's decision in *Giddings & Lewis.*

waived this statutory right in the strike settlement agreement nor during negotiations. Accordingly, I find that Respondent maintained and applied an unlawful recall procedure that had the effect of according superseniority to strike replacements over unreinstated strikers, and Respondent has thereby violated Section 8(a)(1) and (3) of the Act.

Regarding Respondent's August 18, 1982 letter to unreinstated strikers, Manufacturing Manager Neil Bone testified that it was precipitated by a problem that Respondent had in contacting one of the unreinstated strikers when Respondent was in a position to offer her available work. Bone testified that on July 29, 1982, Respondent wrote to Rosemary Taylor telling her that Respondent wanted her to return to work on August 2. Taylor apparently did not reply to the letter, and at the end of 5 days, Respondent then recalled another employee, Yvonne Threadgill. Respondent allowed Threadgill 5 days in which to return to work. As a result of those delays, Respondent lost approximately 10 workdays during which it might otherwise have gotten production from an employee. According to Bone, two active employees had to be assigned the work during the period of the delay, thereby causing Respondent to lose production in the area where those two other employees normally work. As a result of this experience, Respondent drafted and mailed the August 18 letter to all the yet unreinstated strikers.

Respondent's reason for mailing the August 18 letter to unreinstated strikers is neither logical nor consistent. As Respondent concedes, the August 18 letter was mailed only to the unreinstated strikers. Rosemary Taylor, however, was not an unreinstated striker. Taylor was a striker, but she had previously been reinstated. Thereafter, she was laid off. Respondent's attempt to recall Taylor was not an attempt to recall an unreinstated striker but rather an employee on layoff pursuant to the collective-bargaining agreement. Respondent's failure to have the correct mailing address of Taylor was not due to the fact that unreinstated strikers had not kept in contact with Respondent. It was due to the fact

that Respondent had not kept current mailing addresses of active employees. Why then did Respondent mail the August 18 letter only to unreinstated strikers and not to laid-off employees, reinstated strikers, and permanent replacements alike? Respondent's answer to this question does not ring true. Its asserted answer is that a problem such as that caused by a short-term layoff (i.e., Rosemary Taylor) is magnified when 2½ years have elapsed since the last employee-employer contact, as was the case with at least certain of the unreinstated strikers. Respondent also answers the questions posed above in part by noting that while employees laid off in 1982 were not sent copies of the August 18 letter, they were sent a letter in which they were asked:

> Please make sure that your current address on file is your correct address as your last paycheck and any recall correspondence will be mailed to the address on file.

Both of Respondent's partial answers to the question posed above fail to answer or even address why Respondent took it upon itself to treat the two groups disparately. To the laid-off employees, Respondent simply asked that they maintain their current address on file. To the unreinstated strikers, Respondent took it upon itself to threaten them that if they failed to respond within 5 workdays, Respondent "will take your name off the unreinstated striker list and your employment rights . . . will be terminated." Respondent's disparate treatment belies its asserted business justification for sending the August 18 letter to unreinstated strikers. *Charleston Nursing Center*, 257 NLRB 554 (1981), could not be more on point. In that case, the Board holds:

> [W]e conclude that, although an employer may legally request replaced economic strikers to furnish current information about their interests and reinstatement, an employer may not require replaced economic strikers to respond to such a request or risk losing their reinstatement rights.

In its brief, Respondent both quotes out of context from and misconstrues the Board's decision in *Charleston Nursing Center*. The Board's holding in that case, however, is so clear that further discussion regarding Respondent's argument on this point is unnecessary. I find that Respondent's letter of August 18 constitutes an express threat to terminate the employment rights of unreinstated strikers for failing to respond to its letter and thereby violates Section 8(a)(1) of the Act.[3]

CONCLUSIONS OF LAW

1. Respondent Aqua-Chem, Inc., Cleaver Brooks Division, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating, maintaining, and enforcing a policy and practice which discriminates against unreinstated strikers in the filling of postlayoff vacancies, Respondent has

[3] In view of the above, I find it unnecessary to decide whether Respondent's sending the August 18 letter had the effect of changing the employment status of unreinstated strikers who did not respond to the letter in violation of Sec. 8(a)(3) or whether by sending this letter without having afforded the Union an opportunity to negotiate and bargain with respect to it, Respondent thereby violated Sec. 8(a)(5) of the Act. Manufacturing Manager Bone testified that if a vacancy occurred in the future, he did not know what would be done as far as Respondent making any effort to contact unreinstated strikers who did not respond to Respondent's August 18 letter. The General Counsel's theory of a discriminatory change in job status is based solely on Bone's lack of knowledge about how such individuals would be treated as compared to other employees. Since Respondent's threat to terminate reinstatement rights is express and in clear violation of Sec. 8(a)(1) of the Act, I find it appropriate in my Order to require that Respondent cease and desist from threatening such action or from carrying out the threat.

interfered with, restrained, and coerced Henry Holmes and its other employees who are unreinstated strikers in the exercise of their rights guaranteed them by Section 7 of the Act, and Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By threatening its employees with termination of their reemployment rights if they did not respond to Respondent's letter of August 18, 1982, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The unfair labor practices that Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions necessary to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Supreme Court, U.S.
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No. 90-1520

In the Supreme Court of the United States

OCTOBER TERM, 1990

AQUA-CHEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the layoff of striker replacements who had no reasonable expectation of recall creates job vacancies that trigger the reinstatement rights of unreinstated former strikers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-13) is reported at 910 F.2d 1487. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 1-4) is reported at 922 F.2d 403. The decision and order of the National Labor Relations Board (Pet. App. 14-54) is reported at 288 N.L.R.B. 1108.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1990, and a petition for rehearing was denied on January 8, 1991. The petition for a writ of certiorari was filed on April 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a manufacturing facility in Greenville, Mississippi. In March 1980, negotiations between petitioner and its employees' union for a new collective bargaining agreement broke down, and petitioner's employees went out on strike. The strike ended in August 1980. At that time, petitioner's work force consisted of 69 permanent striker replacements and 25 former strikers. The strike settlement agreement negotiated by the parties included the substantive provisions of a new collective-bargaining agreement, as well as provisions for the recall of striking employees. Under the latter provisions, striking employees were to be returned to work "as job vacancies occurred." Pet. App. 6, 16, 31-32. The parties negotiated a new collective bargaining agreement in December 1981. The parties "agreed to abide by the provisions of the earlier agreement pertaining to the reinstatement rights of strikers" (*id.* at 16), but also "provided for recall from layoff 'in reverse order of layoff'" (*id.* at 6).

In March 1982, petitioner laid off 15 employees—14 striker replacements and one former striker—because of lack of work. Petitioner told the laid-off workers that its economic situation was bad and that the layoff was for an indefinite period. Petitioner also informed those employees that their life insurance would be canceled immediately, that their medical insurance would terminate at the end of the next month, and that they should look for other jobs or apply for unemployment compensation. Pet. App. 6, 16, 33. Between May and August 1982, petitioner recalled three of the laid-off striker replacements. It did not offer positions to any of the former strikers who were not reinstated at the conclusion of the 1980 strike. *Id.* at 15 n.1, 17.

2. The administrative law judge (ALJ) found that petitioner's decision to recall the laid-off replacements rather

than reinstate more senior former strikers violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3). He found that the layoff of the replacements constituted a "departure" within the meaning of *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), and that the unreinstated strikers were therefore entitled to preferential consideration for the resulting job vacancies. Pet. App. 50-51.

The Board affirmed on different grounds. It rejected the ALJ's reasoning that an economic layoff of permanent replacements for a prolonged indefinite period automatically constitutes a vacancy that triggers the unreinstated strikers' *Laidlaw* rights. Pet. App. 18. That rule, the Board stated, failed to take adequate account of the employer's right, established in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), to treat replacements hired during an economic strike as permanent employees. Pet. App. 18-19. The Board also noted, however, that under Section 2(3) of the Act, 29 U.S.C. 152(3), strikers remain employees unless they obtain equivalent employment elsewhere and that economic strikers have a statutory right to vacancies at the conclusion of a strike. Pet. App. 19-20, citing *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *Laidlaw*, *supra*.

Balancing those two rights, the Board held that, to establish a violation of strikers' *Laidlaw* rights by virtue of the preferential rehire of laid-off replacements, the General Counsel must show that the replacements' layoffs "truly signified" their departure—*i.e.*, "that, based on objective factors, the laid-off permanent replacements had no reasonable expectancy of recall." Pet. App. 20. The burden then shifts to the employer to show that no such vacancy occurred "or that its failure to recall the striker was otherwise based on legitimate and substantial business justifications." *Ibid.*

Applying that test to the facts, the Board found that the General Counsel met his burden of establishing that, at the time of the layoffs, the laid-off striker replacements had no reasonable expectancy of recall. The Board relied on the fact that "employees were advised that the layoff was due to a lack of work and for an indefinite period, that their insurance benefits were to be canceled, and that they should look for another job or apply for unemployment compensation." Pet. App. 21-22.[1] The Board further found, in agreement with the ALJ, that petitioner had failed to establish its asserted justification that the collective bargaining agreement effectively waived the strikers' recall rights by providing that recalls from job layoffs were to proceed in "reverse order of layoff." *Id.* at 18 n.4, 22 n.7, 47-50; see *id.* at 6, 16.[2] Accordingly, the Board held that petitioner

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[1] The Board found that this evidence establishing that the laid-off employees did not have a reasonable expectancy of recall was not overcome by a "vague representation" in petitioner's letter to those employees that it would make every effort to return them to work as soon as possible. Pet. App. 22.

[2] The ALJ, applying the principle that a waiver of the strikers' statutory *Laidlaw* rights must be clear and unmistakable, found "no credible evidence on which to base a conclusion that the parties understood, discussed, or even assumed that the strike settlement would exclude unreinstated strikers from reinstatement in the event of a layoff of replacements." Pet. App. 49. Thus, he noted that during the 1980 negotiations "there was no discussion concerning the recall rights of reinstated strikers in the event of a layoff of replacements," and that petitioner "throughout negotiations insisted consistently and steadfastly that the collective-bargaining agreement and the provisions of the strike settlement agreement dealing with the reinstatement of strikers were separate and unrelated." *Ibid.* The ALJ concluded that "the term 'vacancy' in the strike settlement agreement must therefore be controlled by the statutory definition of rights pursuant to the Board's decision in *Laidlaw Corp.*," rather than by the "terms in the recall procedure" of the collective-bargaining agreement. *Id.* at 49-50.

violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by offering the job openings to laid-off replacements rather than unreinstated former strikers. Pet. App. 22. The Board ordered petitioner to offer reinstatement, with backpay, to those unreinstated strikers for whom positions were available. *Id.* at 23.[3]

3. The court of appeals affirmed the Board's decision and enforced its order. Pet. App. 5-13. The court, like the Board, pointed out that due regard for the rights of unreinstated strikers and permanent replacements required the Board to accommodate the conflicting policies of *Fleetwood Trailer*, which recognized that economic strikers are entitled to reinstatement at the conclusion of a strike, and *Mackay*, which held that a company may hire permanent replacements during an economic strike. Pet. App. 7-8. The court concluded that the Board's test was "both rational and consistent with the policies behind the NLRA because it comports with the *actual* expectations of all concerned: the unreinstated strikers, the replacement workers and the company." *Id.* at 9. It also concluded that the Board's test "str[uck] a fair balance between the competing policies." *Id.* at 9-10. The court further held that the Board's factual finding that the laid-off employees had no reasonable expectancy of recall was supported by "substantial, and unrebutted, evidence." *Id.* at 10.

Petitioner sought rehearing and suggested rehearing en banc. All of the judges on the original panel voted to deny rehearing, and a majority of the circuit judges voted to deny

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[3] The Board also adopted the ALJ's finding that petitioner violated Section 8(a)(1) of the Act by its August 1982 letter to unreinstated strikers threatening cutoff of reemployment rights should they fail to furnish written notice within five days of their intention to retain those rights. Pet. App. 15 n.2. The court of appeals sustained that finding (*id.* at 11-13), and it is not an issue here.

rehearing en banc. Judge Posner, in a dissent joined by three other judges, stated that the panel decision was inconsistent with the Seventh Circuit's earlier decision in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (1982), which he viewed as the "sounder decision." Pet. App. 3-4. Judge Posner read the collective bargaining agreement's provision for recall in reverse order of layoff as superseding the statutory right, recognized in *Fleetwood Trailer* and the strike settlement agreement, of striking employees to return to work. *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the Board's new rule respecting the rights of laid-off striker replacements and unreinstated former strikers is a reasonable accommodation of the competing interests and that it was properly applied in this case. The court's decision on this issue "of first impression" (Pet. App. 7) does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Economic strikers retain their status as employees under the National Labor Relations Act and are entitled to full reinstatement to their former positions at the conclusion of a strike. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). If, after the strikers have offered to return to work, the employer refuses to reinstate them, "the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by * * * the Act * * *. Accordingly, unless the employer * * * can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

It is also settled that an employer faced with an economic strike may choose to continue his business during the strike by hiring permanent replacements to perform the work of striking employees. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). After the strike ends, he "is not bound to discharge those hired to fill the places of strikers * * * in order to create places for them." *Id.* at 345-346. However, when an employer exercises his right to replace economic strikers, the former strikers retain their preferential reinstatement rights, and are "entitled to full reinstatement upon the *departure* of replacements," unless the employer can "sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-1370 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970) (emphasis added).

This case involves the question of when a layoff of striker replacements should be considered a "departure" within the meaning of *Laidlaw*, so as to trigger the strikers' rights to reinstatement. Previously, the Board had held that a layoff of striker replacements for a long and indefinite period automatically amounted to a departure and thereby created a job vacancy, so that the recall of replacements over strikers (or the mere maintenance of a policy providing for such recall) violated the strikers' reinstatement rights. *Giddings & Lewis, Inc.*, 255 N.L.R.B 742, 743-745 (1981), enforcement denied, 675 F.2d 926 (7th Cir. 1982). After further consideration of the question, the Board, abandoning its per se approach, announced a new rule in this case.

Under that rule, the burden is on the General Counsel to establish, based on objective factors, that, at the time of the layoff, the replacements had no reasonable expectancy of recall.[4] The relevant objective factors include

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[4] That test is essentially the same as the Board's well-established and judicially approved test for determining the voting eligibility of

evidence concerning the employer's past experience, the employer's future plans, the length of the layoff, the circumstances of the layoff, and what the employee was told regarding the likelihood of recall. Once the General Counsel has established a prima facie case that a vacancy exists to which the striker is entitled under *Laidlaw*, the burden then shifts to the employer to show that in fact no such vacancy occurred or that its failure to recall the striker was otherwise based on legitimate and substantial business justifications. Pet. App. 20.

The court of appeals correctly concluded that the Board's new rule is "both rational and consistent with the policies behind the NLRA because it comports with the *actual* expectations of all concerned; the unreinstated strikers, the replacement workers and the company." Pet. App. 9. Thus, when a striker replacement is laid off with no reasonable expectation of recall, the replacement, at the time of layoff, no longer has any reason to believe that he or she has a job with the employer. The employer's perception of the status of the replacements is the same. And, in those circumstances, the unreinstated strikers have a justified expectation of vindicating their *Laidlaw* right to reinstatement.

Contrary to petitioner's assertion, the Board's rule does not place "both the employer and the replacements * * * 'at sea' with respect to what offers of permanency can be made and what offers of permanency are valid." Pet. 11. The "reasonable expectation of recall" test rests on objective factors which have been delineated in the many years that the test has been applied to determine employee eligibility to vote in Board elections. See note 4, *supra*. Moreover, a striker replacement's prospect for permanency under *Mackay* is neither absolute nor risk free. The replace-

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employees on layoff status. See, for example, *Beloit Corp.* v. *NLRB*, 857 F.2d 1154, 1157 (7th Cir. 1988) (collecting cases).

ment may be displaced by a strike settlement agreement that provides for immediate recall of the strikers, or by a change in business conditions that causes jobs to be abolished. The risk of losing a job due to a layoff that, at the time, appears to be permanent, is qualitatively no different from these other risks that a striker replacement must assume.

2. There is no merit to petitioner's contention (Pet. 7-9) that the decision below conflicts with *Mackay* and subsequent decisions of this Court affirming the employer's right to hire permanent replacements for economic strikers. In *Mackay*, the Court recognized the employer's right to continue to operate in the face of an economic strike and, to that end, accorded it the ability to offer employment to striker replacements that does not terminate at the conclusion of the strike. 304 U.S. at 345-346.[5] In *Mackay* the Court did not address the question here—whether subsequently laid-off replacements can be said to have "departed," thereby creating a job vacancy, for purposes of triggering the strikers' *Laidlaw* rights.

The rationale of *Mackay* does not support denying strikers their *Laidlaw* rights in the circumstances presented here. While the employer's ability to continue his business is undoubtedly enhanced by the ability to offer striker replacements a job that is not coterminous with the strike, no such business justification attaches, months or years later, to preferential treatment of laid-off replacements over unreinstated strikers, where the former have no reasonable expectation of recall. The permanent replacement rule does

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[5] See also *NLRB* v. *Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980) ("The rationale for [the *Mackay*] exception to the general rule is that the employer's interest in continuing his business during a strike and the needed inducement of permanent employment to obtain replacements is a sufficient business justification overcoming protection for economic strikers.").

not exist in a vacuum, and this Court, while continuing to adhere to it, has refused to extend it beyond its logic. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963); *NLRB* v. *Fleetwood Trailer Co.*, *supra*.

Similarly, nothing in this Court's decisions in *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426 (1989) (*TWA II*), or *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), extends *Mackay* beyond its rationale or lends support to petitioner's argument. In *TWA II* the Court held that full-term strikers were not entitled to displace more junior employees who abandoned the strike and went back to work, taking the full-term strikers' jobs. The language quoted by petitioner (Pet. 6)—that if the strike proves unsuccessful, strikers "gamble" and "suffer the consequences" (*TWA II*, 489 U.S. at 438)—refers to the fact that a striker who has been permanently replaced must await a job vacancy before he can return to work. The Court had no occasion to address the question whether or when the layoff of replacements would create job vacancies that activate the strikers' replacement rights.

In *Belknap*, the Court held that the National Labor Relations Act did not preempt a state court breach of contract action by replacements who were offered "permanent" status during a strike but were then discharged, after the strike, to make room for former strikers. The portions of the Court's opinion quoted by petitioner (Pet. 8, 9) merely recognize that breach of a *Mackay*-based promise that the replacements will not be discharged to make room for returning strikers could give rise to a contract action against the employer. They do not suggest that such a promise could abridge the strikers' *Laidlaw* rights to job vacancies that may arise in the future.

Moreover, this Court has repeatedly admonished that, where the policies of *Mackay* and reinstatement rights must be accommodated, "the balancing of the conflicting legiti-

mate interests * * * [is] committed primarily to the National Labor Relations Board, subject to limited judicial review." *Erie Resistor Corp.*, 373 U.S. at 236. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990), and cases cited therein; see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 nn. 11-14, 845 (1984). This case presents such an instance, and the decision of the court of appeals upholding the Board's rule should be left undisturbed.

3. Petitioner's further contention that the Board's application of its rule deprived the striker replacements of their contract rights is inconsistent with the Board's actual findings. Petitioner argues that, "[a]t the time of the layoff, each replacement was contractually assured that they would be recalled in reverse order of layoff provided the recall opportunity occurred during their defined period of seniority retention." Pet. 7. "It is illogical," petitioner adds, "to hold that an employee has no reasonable expectation of being able to exercise a contractually guaranteed right shared with all other employees covered by the contract." *Ibid.* However, petitioner's argument, like that of Judge Posner's dissent from the denial of rehearing en banc (Pet. App. 2-4), rests on the premise that the contract provision respecting recall from layoff was intended to alter the strikers' *Laidlaw* rights. The ALJ found (Pet. App. 47-50)—and the Board sustained his finding (*id.* at 18 n.4, 22 n.7)—that there was "no credible evidence on which to base a conclusion that the parties understood, discussed, or even assumed that the strike settlement agreement would exclude unreinstated strikers from reinstatement in the event of a layoff of replacements." *Id.* at 49.

In short, the contractual recall provision in this case does not answer the question whether striker replacements who are laid off are entitled to be recalled ahead of unreinstated strikers. The answer to that question, under *Laidlaw*, turns

on whether the layoff created a job vacancy. The Board held that the layoffs in this case did create job vacancies because the laid-off striker replacements had no objectively reasonable expectation of recall. The court of appeals properly found "the Board's factual conclusions on this issue to be supported by substantial, and unrebutted, evidence." Pet. App. 10. Those employees were told that their layoffs were indefinite, that their life insurance would be canceled immediately, that their medical insurance would be terminated at the end of the next month, and that they should look for other jobs or apply for unemployment compensation.[6] In any event, whether the parties intended the recall provision to apply in a case such as this is not an issue warranting review by this Court.

4. Petitioner is also incorrect in asserting (Pet. 9-11) that the court of appeals' decision warrants review because it is inconsistent with decisions of other courts of appeals. Petitioner relies on *Medallion Kitchens, Inc.* v. *NLRB*, 806 F.2d 185 (8th Cir. 1986), cert. denied, 481 U.S. 1037 (1987). In that case, the court held that the employer violated the National Labor Relations Act when, following a fire that shut down its operations, it returned striker replacements to work rather than former strikers. The decision turned on whether the striker replacements were temporary or permanent, and the court found that substantial evidence supported the Board's finding that they were temporary. 806 F.2d at 187, 190-191. While the court stated that, had the replacements been permanent, this would have afforded the employer a

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[6] Compare *Mike Yurosek & Son, Inc.*, 295 N.L.R.B. No. 35 (June 15, 1989), slip op. 5-6 (permanent replacements had a reasonable expectation of returning in December to the positions they had left the previous May, since the employer's past practice showed that "seasonal layoffs are defined, predictable, and clearly linked to the availability of the commodities with which the employees work").

substantial and legitimate business justification for its action (*id.* at 189), that statement is merely dictum. Moreover, the court had no occasion to consider the validity of the Board's present rule for accommodating the rights of permanent replacements and strikers in a layoff.

Petitioner also mistakenly relies on *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985). In that case, low-seniority, essentially part-time employees who crossed a picket line were awarded the driving slots of more senior strikers, which carried with them more regular employment. When the strike ended, the company reinstated the strikers as vacancies occurred but did not displace the employees who had crossed the picket line and been awarded full-time slots. *Id.* at 79. The Board found that the failure to displace those employees was the equivalent of granting them the kind of super-seniority condemned in *Erie Resistor*. The court of appeals disagreed, finding that the employer's conduct was more akin to granting permanent replacement status as sanctioned by *Mackay*. *Id.* at 80-81. As in *TWA II*, the court did not consider the effect of a subsequent layoff on the relative rights of replacements and unreinstated former strikers.

Finally, the Seventh Circuit's earlier decision in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (1982), is also distinguishable. As the panel noted in its decision (Pet. App. 10 n.4), in that case the court reversed a Board decision holding that an employer's policy statement giving preferential treatment to laid-off replacements violated the NLRA; no layoffs had yet occurred and thus there was no basis for determining whether they had created job vacancies. Moreover, as noted above, the Board has now repudiated its analysis in *Giddings* and adopted, in the instant case, a test giving more weight to the employer's right to hire permanent replacements. But even assuming arguendo that the decision below and the court's decision in *Giddings* are

irreconcilable, that conflict, and the en banc court dissenters' preference for *Giddings* (Pet. App. 3), raises only an intra-circuit disagreement that does not warrant this Court's review. See, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1990

AQUA-CHEM, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

IN ITS BRIEF, THE NATIONAL LABOR RELATIONS BOARD HAS MISCHARACTERIZED THE PETITIONER'S ARGUMENT AND JUDGE POSNER'S DISSENT

Throughout the judicial appeal process, Petitioner has consistently maintained one simple and straightforward proposition: so long as laid off replacements possess contractual recall rights, there is no "vacancy" as would trigger *Laidlaw* striker replacement rights. In its brief, the National Labor Relations Board mischaracterizes this argument and Judge Posner's acceptance of it in his dissent, as one of waiver — "that the contract provision respecting recall from layoff was intended to alter the striker's *Laidlaw* rights." (Respondent's brief, p. 11). It is not the Petitioner's argument that the

contract serves to "alter" the reinstatement rights of strikers, but rather that it defines those rights in the first instance.

In the underlying decisions, the National Labor Relations Board, as affirmed by the Seventh Circuit, held that the existence or non-existence of a *Laidlaw* vacancy would be determined by whether or not a laidoff replacement has a reasonable expectation of recall. If such an expectation exists, then the layoff does not create a vacancy and the replacement may lawfully be recalled.

It is Petitioner's argument that each employee covered by the contract, including permanent replacements, has a reasonable expectation – premised upon contractually guaranteed and enforceable recall rights – that he or she will be recalled to whatever openings might arise during their period of seniority retention. Such a right exists irrespective of whether the likelihood of being able to exercise it is definite and certain or more speculative and remote at the time of layoff. The argument is not one of waiver, but rather one of affording the replacements the full extent of the contractual protection to which they are entitled as permanent employees.

The Board does not dispute that the replacements were entitled to recall protection. It simply asserts that the reinstatement rights of the striker supersede that protection because, in its assessment, the replacements could not have reasonably expected to be recalled at the time they were laid off. The Board focuses on a speculative analysis of the business conditions at the time of the layoff rather than focus on what actually occurred – a recall within the defined period of seniority retention. Why?

If a gambler in Las Vegas places a chip on one number at the roulette table, he may not have a reasonable expectation of having his number come up, but he does have a reasonable expectation that the casino will pay him off if it does. So it was with the replacements in this case. The economic forecast at the time of the layoff was negative but the replacements nevertheless possessed a reasonable expectation – indeed, a right – of being recalled to whatever

openings might arise during their period of seniority retention. When openings did in fact occur, Petitioner did nothing more than honor its contractual obligation to the replacements through recall.

The Board has disregarded reality in favor of a speculative assessment by which it has concluded that what did happen should not have happened. At the NLRB's casino, the lucky roulette player is denied his payoff because it was not reasonable for him to have expected to win when he placed his bet. There is no way that such a strained form of analysis and its absurd result can be reconciled with this Court's decision in *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

CONCLUSION

For the reasons presented here and in the Petition, it is respectfully submitted that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Seventh Circuit below.

Dated at Milwaukee, Wisconsin this 19th day of June, 1991.

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